Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(9)

No. 04-1414

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JEFFREY GRUBBS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: APR. 21, 2005
CERTIORARI GRANTED: SEPT. 27, 2005

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:02-CR-00164-WBS-1

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFEREY GRUBBS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
04/19/2002	1	COMPLAINT by US Attorney naming Jefferey Grubbs (1) count(s) cmp, before Magistrate Judge John F. Moulds [2:02-m-84] (old) (Entered: 04/19/2002)
04/19/2002	2	MINUTES before Magistrate Judge John F. Moulds RE: initial appearance; dft present in custody; advised; first appearance of Jefferey Grubbs; FD Mark Joseph Reichel appointed; defense request detention hrg; detention hearing SET on 2:00 4/24/02 for Jefferey Grubbs; govt moves for detention; preliminary hrg to be set at next appearance;

DATE	DOCKET NUMBER	PROCEEDINGS
		C/R ECRO TAPE 1/1 [2:02-m-84] (old) (Entered: 04/22/2002)
		* * * * *
04/25/2002	6	INDICTMENT by US Attorney Camil Antoinette Skipper; Counts filed against Jefferey Grubbs (1) count 1 (mm1) (Entered: 04/25/2002)
05/03/2002	7	MINUTES before Magistrate Judge John F. Moulds RE: arraignment; dft Jefferey Grubbs arraigned; not guilty plea entered; Attorney Linda Harter present for Mark Reichel; status hearing SET for 9:00 5/8/02 for Jefferey Grubbs; Judge Shubb's excludable order given out in court; C/R none (old) (Entered: 05/06/2002)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
06/21/2002	16	NOTICE OF MOTION AND MOTION to suppress evidence and statements; by defendant Jefferey Grubbs; Memorandum of Points and authorities in support thereof; hearing SET for 9:00 8/7/02 before the Chief Judge William B Shubb (lm) (Entered: 06/24/2002)
	* * * * *	
09/17/2002	30	OPPOSITION by plaintiff USA to Motion to Suppress Evidence and Statements; by defendant Jefferey Grubbs [16-1] (lm) (Entered: 09/18/2002)
	* * * * *	
10/02/2002	32	REPLY by defendant Jefferey Grubbs to Motion to Suppress Evidence and statements; Memorandum of Points and authorities in support thereof by defendant Jefferey Grubbs [16-1] (lm) (Entered: 10/03/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
10/15/2002	33	MINUTES before Chief Judge William B Shubb RE: Evidentiary Hearing on dft's re motion to suppress evidence and statements by defendant Jefferey Grubbs [16-1] First day; Govt witness Patrick Esteban sworn and testified on direct; x-exam; re-direct; govt witness Gary Welsh sworn and testified on direct; x-exam; defense witness Carol Bradstreet sworn and testified on direct; x-exam; matter continued to 10/23/02 at 10:00; court adjourned C/R Kelly O'Halloran (lm) (Entered: 10/16/2002)
10/21/2002	34	BRIEF by defendant Jefferey Grubbs after hearing on Motion to Suppress Evidence and Statements [16-1] (lm) (Entered: 10/22/2002)
10/23/2002	35	MINUTES before Chief Judge William B Shubb; Further hearing on Motion to suppress evidence and statements; by defendant Jefferey Grubbs [16-1] HEARING CONTINUED to

DATE	DOCKET NUMBER	PROCEEDINGS
		9:00 11/6/02 C/R Kelly O'Halloran (lm) (Entered: 10/24/2002)
10/28/2002	36	RESPONSE by plaintiff United States to Defendant's Brief after hearing on Motion to Supress Evidence and Statements [34-1] (lm) (Entered: 10/29/2002)
10/28/2002	37	ATTACHMENT by plaintiff United States in SUPPORT of the Government's Response to Defendant's Brief after hearing on Motion to Suppress Evidence and Statemens [36-1] (lm) (Entered: 10/29/2002)
10/30/2002	38	ORIGINAL DECLARATION of US Postal Inspector Gary Welsh in SUPPORT of Government's Response to Dft's Brief after hearing on Motion to Suppress Evidence and Statements [36-1] (lm) (Entered: 10/31/2002)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/04/2002	40	TRANSCRIPT of 10/15/02 hearing on motion to suppress as to defendant Jefferey Grubbs by C/R Kelly O'Halloran (mdp) (Entered: 11/05/2002)
	* * * * *	
12/02/2002	47	TRANSCRIPT of 10/23/02 hearing on motion to suppress as to defendant Jefferey Grubbs by C/R K. O'Halloran (daw) (Entered: 12/03/2002)
12/02/2002	48	DEFENSE BRIEF by defendant Jefferey Grubbs outlining argument for suppression of evidence (daw) (Entered: 12/03/2002)
	* * * * *	
12/04/2002	50	MINUTES before Chief Judge William B. Shubb: closing argument on dft motion to suppress evidence and statements; by defendant Jefferey Grubbs [16-1] CONTINUED TO 9:00 12/11/02; dft present and on bail; appearances by Camil Skipper for govt and Mark Reishel AFD C/R K. O'Halloran (daw) (Entered: 12/05/2002)

DATE	DOCKET NUMBER	PROCEEDINGS
12/11/2002	51	MINUTES before Chief Judge William B. Shubb court hears closing arguments on defendants motion to suppress evidence by defendant Jefferey Grubbs, then takes his motion under [16-1] SUBMISSION status hearing set for 9:00 1/8/03 for Jefferey Grubbs C/R Kelly O'Halloran (mdp) (Entered: 12/12/2002)
		* * * * *
01/15/2003	54	MINUTES before Chief Judge William B. Shubb; motion to suppress evidence and statements by defendant Jefferey Grubbs [16-1] DENIED; status hearing set for 9:00 1/22/03 for Jefferey Grubbs; C/R K Watkins (crf) (Entered: 01/16/2003)
01/16/2003	53	MEMORANDUM AND ORDER by Chief Judge William B. Shubb motion to suppress evidence and statements by defendant Jefferey Grubbs [16-

DATE	DOCKET NUMBER	PROCEEDINGS
		1] DENIED (cc: all counsel) (daw) (Entered: 01/16/2003)
		* * * * *
01/22/2003	56	NOTICE OF MOTION AND MOTION for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs; Motion hearing set for 9:00 1/23/03 (mm1) (Entered: 01/23/2003)
01/29/2003	57	RESPONSE by plaintiff USA to motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (daw) (Entered: 01/30/2003)
02/06/2003	58	REPLY by defendant Jefferey Grubbs to response to motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (sk) (Entered: 02/07/2003)
02/12/2003	59	MINUTES before Chief Judge William B. Shubb: dft present and on bail; court hears oral argument on dft's motion for reconsideration; motion DENIED; court to issue order; change of plea hearing SET

DATE	DOCKET NUMBER	PROCEEDINGS
		for 9:00 2/27/03 for Jefferey Grubbs; appearances by Camil Skipper and Mark Reichel C/R K. O'Halloran (daw) (Entered: 02/13/2003)
02/13/2003	61	BRIEF by defendant Jefferey Grubbs following oral argument on motion for reconsideration (daw) (Entered: 02/14/2003)
02/14/2003	60	MEMORANDUM AND ORDER by Chief Judge William B. Shubb: motion for Reconsideration of denial of Motion to Suppress evidence by defendant Jefferey Grubbs [56-1] (cc: all counsel) (daw) (Entered: 02/14/2003)
		* * * * *
03/05/2003	66	MINUTES before Chief Judge William B Shubb Re: Change of Plea; Guilty plea entered by Jefferey Grubbs (1) count(s) 1 of the Indictment; Sentencing hearing SET for 9:00 5/14/03 for Jefferey Grubbs C/R Patricia Hernandez (lm) (Entered: 03/06/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
03/17/2003	67	TRANSCRIPT of 3/5/03 as to defendant for change of plea hearing by C/R P Hernandez (ak) (Entered: 03/18/2003)
	* * * * *	
05/21/2003	70	MINUTES before Judge William B. Shubb sentencing Jefferey Grubbs (1) count(s) 1 to imprisonment of 33 mos; to surrender after conclusion of appeal; TSR 36 mos; Fine $3,700; S/A $100 due immediately; see J&C for special conditions; terminating defendant Jefferey Grubbs; case terminated; C/R Keli Rutherdale (crf) (Entered: 05/22/2003)
05/27/2003	71	NOTICE of Appeal to 9th Circuit by Dft Jefferey Grubbs Conviction and Sentence [70-1], and to Order denying Dft's Motion to Suppress Evidence[53-1] (fee status Not paid) (lm) (Entered: 05/28/2003)

DATE	DOCKET NUMBER	PROCEEDINGS
05/29/2003	72	JUDGMENT and Commitment issued as to Jefferey Grubbs by Judge William B. Shubb (daw) (Entered: 06/02/2003)
		* * * * *
06/10/2003	76	TRANSCRIPT of 1/15/03 hearing on Dft's Motion to Supress as to defendant Jefferey Grubbs by C/R Kimberly M Watkins (lm) (Entered: 06/11/2003)
		* * * * *
06/23/2003	82	TRANSCRIPT of 12/4/02 hrg on Further Hearing Re Motion to Suppress as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
06/23/2003	83	TRANSCRIPT of 12/11/02 hrg on Further Hearing re Motion to Suppress as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
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DATE	DOCKET NUMBER	PROCEEDINGS
06/23/03	85	TRANSCRIPT of 2/12/03 hearing on Motion for Reconsideration as to Dft Jefferey Grubbs by C/R Kelly O'Halloran (lm) (Entered: 06/24/2003)
	* * * * *	
07/08/03	87	TRANSCRIPT of 5/21/03 hearing on Sentencing as to defendant Jefferey Grubbs by C/R Keli Rutherdale (lm) (Entered: 07/09/2003)
	* * * * *	
07/15/03	89	TRANSCRIPT of 05/03/02 hearing on Arraignment as to defendant Jefferey Grubbs by VDRP (sk) (Entered: 07/16/2003)
07/15/03	90	TRANSCRIPT of 04/19/02 hearing on Initial Appearance by ECRO (sk) (Entered: 07/21/2003)
	* * * * *	

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-10311

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JEFFEREY GRUBBS, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
6/13/03	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 5/21/03; setting schedule as follows: transcript shall be ordered by 6/17/03 for Jefferey Grubbs; transcript shall be filed by 7/17/03; appellants' briefs, excerpts due by 8/26/03 for Jefferey Grubbs; appellees' brief due 9/25/03 for USA; appellants' reply brief due by 10/9/03 for Jefferey Grubbs. (RT required: y) (Sentence imp 33 months) [03-10311] (ft)
	* * * * *
9/11/03	Filed original and 15 copies aplt's opening brief of 35 pages and 5 excerpts of record in 2 volumes; served on 09/09/03. (Informal: No) [03- 10311] (dv)

DATE	PROCEEDINGS
	* * * * *
11/3/03	Filed original and 15 copies appellee USA's 27 page brief, 5 supplemental excerpts of record in 1 volume; served on 10/30/03. [03-10311] (je)
11/14/03	Filed original and 15 copies Jefferey Grubbs reply brief (Informal: n) 7 pages; served on 11/13/03. [03-10311] (je)
	* * * * *
2/2/04	FILED CERTIFIED RECORD ON APPEAL: 2 CLERK'S RECORDS & 1 REPORTER'S TRANSCRIPT. (ORIGINAL) [03-10311] (sd)
3/9/04	ARGUED AND SUBMITTED TO Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani [03-10311] (ah)
3/9/04	Received USA additional citations, served on 3/9/04. (panel) [03-10311] (ah)
7/26/04	FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Oral Hearing; Reversed/Remanded; Written, Signed, Published. Betty B. FLETCHER; Stephen R. REINHARDT, author; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [03-10311] (je)
	* * * * *

DATE	PROCEEDINGS
9/9/04	Filed original and 50 copies Appellee USA petition for panel rehearing and petition for rehearing en banc in 13 pages; served 9/8/04. [Panel and All Active Judges and Interested Senior Judges] [03-10311] (je)
	* * * * *
10/22/04	Filed Appellant Jefferey Grubbs's opposition and answer to Govt's pfr en banc in 15 pages; served 10/20/04. [Panel and All Active Judges and Interested Senior Judges] [03-10311] (je)
12/6/04	Filed order and amended opinion (Judges Betty B. FLETCHER, Stephen R. REINHARDT, Jane A. Restani) (Orig. opinion id:) The majority opinion filed July 26, 2004, slip op. 9965, and appearing at 377 F3d 1072 (9th Cir. 2004), is hereby amended as follows: 1. Last line on slip op. 9976 and continuing onto slip op. 9977: after "(a)," replace "is incorporated within the four corners of the warrant" with "is sufficiently incorporated into the warrant." With this amendment, the panel has voted to deny the petition for panel rehearing. Judge Reinhardt has voted to deny the petition for rehearing en banc, and Judge B. Fletcher and Judge Restani so recommended. The full court has been advised of

DATE	PROCEEDINGS
	the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 23. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or petition for rehearing en banc shall be entertained. [03-10311] (je)
12/29/04	MANDATE ISSUED [03-10311] (je)

* * * * *

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CRS-02-0164 WBS

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFERY HAYMEN GRUBBS, DEFENDANT

[Filed: Apr. 25, 2002]

VIOLATION: 18 U.S.C. §2252(a)(2)—Receipt of Visual Depliction of Minor Engaged in Sexually Explicit Conduct

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INDICTMENT

The Grand Jury charges: THAT

JEFFERY HAYMEN GRUBBS,

defendant herein, on or about April 19, 2002, in the County of Sacramento, State and Eastern District of California, did knowingly receive a visual depiction that had been mailed pursuant to his request, to wit: a videotape labeled "Lolita Mother and Daughter," the production of which involved the use of a minor engaged in sexually explicit conduct as defined in Title 18, United States Code, Section 2256(2), and which visual depictions were of such conduct.

All in violation of Title 18, United States Code, Section 2252(a)(2).

A TRUE BILL.

_____

FOREPERSON

/s/ JOHN K. VINCENT
JOHN K. VINCENT
United States Attorney

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

MOTION TO SUPPRESS

TUESDAY, OCTOBER 15, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

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[1]

SACRAMENTO, CALIFORNIA

TUESDAY, OCTOBER 15, 2002, 1:30 P.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for an evidentiary hearing on defendant's motion to suppress, your Honor.

THE COURT: Good afternoon.

MR. REICHEL: Good afternoon, your Honor.

MS. SKIPPER: Good afternoon, your Honor.

THE COURT: I'm sorry for the delay.

Is Mr. Grubbs present?

MR. REICHEL: Yes, he is, your Honor.

THE COURT: Why don't you have him sit at the counsel table.

Mr. Reichel, would you like to make a orief opening statement and explain to the Court what the evidence is that you intend to present today?

MR. REICHEL: Thank you, your Honor. To begin, the postal inspector that Ms. Skipper has to testify here today is Jeffrey (sic) Welsh. And Mr. Welsh also testified before the grand jury. I don't have his grand jury transcripts today, which I'm entitled to at a suppression motion under the Jencks Act and Rule 26.2. Ms. Skipper and I discussed

that, and what we propose to do is to have a hearing today anyway. And those were not prepared yet by the government. They don't prepare [2] them unless they're really ready to go to trial. His grand jury transcripts are not in her file. After today's hearing, I think by our agreement, those are going to be produced, and I'm going to look at them. If they materially affect the ruling to the Court or the questions that were asked, then I may come back to the Court. If not, I would just submit it them to the Court for the Court to review them prior to his decision.

THE COURT: How soon do you think the transcripts will be ready?

MS. SKIPPER: I intend to request those when I get back to my office this afternoon. And I imagine I can probably have them by the end of the week.

THE COURT: All right. So is Mr. Welsh the only witness?

MS. SKIPPER: No, your Honor. And that is Gary Welsh from the Postal Inspection Service. And I also have with me Patrick Esteban who is also a postal inspector. He did not testify before the grand jury, your Honor. He was present, though, at the execution of the search warrant.

THE COURT: All right. Those are the two witnesses then?

MR. REICHEL: Those are the two witnesses, your Honor.

THE COURT: Were you going to call the witnesses or was Ms. Skipper? I believe Ms. Skipper was going to call [3] them. I can if the Court would prefer.

THE COURT: Before you call your first witness then, Mr. Reichel, would you like to make an opening statement and tell me what it is you think the issue is that these witnesses will address?

MR. REICHEL: Yes, your Honor. Number one, that when, first of all, that the warrant on its face is a forthwith warrant. And although it's written in there anticipatory, there's nowhere in there that, on the face of the warrant, on the body of the warrant, which has the triggering event. And the case that's discussed in the government's pleading is a case of Hotal, H-o-t-a-l, I believe. And Hotal talks about and discusses that that can be cured. That is defective, but that can be cured with the affidavit having a reference to the triggering event. And specifically if all of the—it sounds like if all of the officers are aware of the triggering event and so forth, then that may be cured.

Additionally, I want to ask him about when Mr. Grubbs was approached outside of his residence, there was immediately a questioning and an answering that took place. I believe clearly he was in custody, and the questions that were asked by the inspectors were likely to illicit an incriminating response, and therefore it violates Miranda.

Additionally, in his declaration he talks about the officers entering the premises immediately prior to—I mean [4] prior to any discussions with

Mr. Grubbs about the location of the videotape and so forth in the form of, they term it, a safety sweep of the premises.

Additionally—

THE COURT: Well, is that the evidence you're trying to suppress?

MR. REICHEL: Yes, your Honor.

THE COURT: All right. Go over that again.

MR. REICHEL: There was an entry before the triggering event was known to have occurred to them, I believe.

THE COURT: I see. Okay. And the tape was found during that entry?

MR. REICHEL: I believe the tape—I don't know, your Honor.

THE COURT: Wouldn't that be important to your point?

MR. REICHEL: Yes. And I don't have that answer.

It's nowhere in anything I've been provided.

THE COURT: So you're going to question the witnesses on that?

MR. REICHEL: Yes, your Honor.

THE COURT: All right.

MR. REICHEL: Additionally, on the consent, they say they weren't allowed to—pursuant to the warrant, they were not allowed to seize the computer and some other items, and that they received a consent from Mr. Grubbs. And I'd like to [5] question them about the circumstances which surround that consent.

THE COURT: Is the computer evidence in the case?

MS. SKIPPER: No, your Honor. The evidence that was found in the computer would likely be relevant conduct under the guidelines. However, he is not charged with possession of any of those matters.

THE COURT: Does he have a right to bring this motion to suppress the matters from being heard by the Court in the event of a conviction at the time of sentencing?

MS. SKIPPER: I don't believe that's a suppression issue, your Honor. It is my understanding that that would be fought after the conviction and at the time of the Court's considering what is relevant conduct. Then the issue will become whether or not there was bad faith on the part of the agents that would preclude the Court from considering that as relevant conduct.

MR. REICHEL: Additionally, your Honor, if at a trial I believe that—I imagine they're going to attempt to introduce everything they found besides the videotape at a trial.

MS. SKIPPER: The government's brief specifically says that that is not the case. It's not relevant, your Honor, to the charge in the indictment.

THE COURT: That's what I thought.

[6]

Why don't you tell me now, Ms. Skipper, what the evidence is that the government intends to offer in the trial.

MS. SKIPPER: At trial, the government would offer the evidence leading up to the purchase of the videotape.

THE COURT: I'm sorry. The tangible evidence. What was found?

MS. SKIPPER: The videotape that was found in the residence.

THE COURT: Anything else resulting from the search?

MS. SKIPPER: No, your Honor, not at trial.

THE COURT: Just the videotape?

MS. SKIPPER: Yes, your Honor. He's charged with receipt. And that's the only thing that he received.

THE COURT: And do you think that you're going to be offering the evidence of the computer and what was in the computer perhaps under 404(b) or to impeach him or for any other purpose?

MS. SKIPPER: No, your Honor. I don't believe that's necessary.

THE COURT: All right.

MS. SKIPPER: It's a very straightforward case. The government would, however, put it forward at sentencing as relevant conduct.

THE COURT: Well, Mr. Reichel, if the government makes that representation and agrees to be bound by that [7] representation that they will not offer anything that was found in the search other than the single videotape, would you still be questioning witnesses about the consent to seize the computer?

MR. REICHEL: No, your Honor. If that's a binding stipulation, I think we can actually proceed to an argument today on the suppression motion without the calling of witnesses, submit it on the declarations that are on file from the government and what's in the declaration from the government.

THE COURT: Well, I assume you're still going to go with the Miranda argument.

MR. REICHEL: I think we can do it based on the pleadings of the parties.

THE COURT: But, Ms. Skipper, are you going to offer his statement or any part of it?

MS. SKIPPER: He did make the statement. Yes, I will be offering the statement that he made that he—or I would attempt to offer the initial statement that it's in the garage, and then there's a

Mirandized statement in which he admits to having ordered the videotape.

And there's also a 41(d) issue with regard to presentation of the search warrant. I don't know if the defendant is abandoning that argument, but the agents are here to testify to that as well.

[8]

MR. REICHEL: I think we can limit this hearing today, your Honor, to the Miranda issue and the voluntariness of his consent—to the Miranda issue. Because the consent is irrelevant if those items are not going to be offered. I think we can stick with the Miranda issue today.

THE COURT: Who is going to testify on that, both Welsh and Esteban?

MS. SKIPPER: Yes, your Honor. They were both present at the interview of the defendant.

THE COURT: If you just called Esteban, then you wouldn't have to worry about the Jencks Act.

MS. SKIPPER: That's true, your Honor.

THE COURT: I don't know whether they're cumulative or not.

MS. SKIPPER: He was present as a note-taker. He did observe everything that occurred. He observed the conversation. He observed the giving of the Miranda warning and Mr. Grubbs' agreeing to testify. So he could.

THE COURT: Why don't you consider that, and then we can shorten the hearing.

MR. REICHEL: I think we could, your Honor. And I'd like to be heard in argument. I think that some of the undisputed facts is something I'd like to highlight for the Court. But if we limit it to the Miranda issue, I think we could get it done quickly.

[9]

THE COURT: All right. So we'll limit it to the Miranda issue. That's the only issue upon which the defendant wishes to offer evidence in light of the government's stipulation to which the Court will hold the government at trial.

MS. SKIPPER: I just have one question, your Honor. Because Postal Inspector Welsh is present, will there be a problem with Postal Inspector Esteban testifying as to what Inspector Welsh told the defendant and the response that was elicited?

THE COURT: It's not being offered for the truth of the matter asserted. It's being offered to show what advice the defendant was given. So it's not hearsay.

MR. REICHEL: That's correct, your Honor. I would agree. And the rules of evidence don't apply at a suppression hearing, I believe, so hearsay does come in.

MS. SKIPPER: I just wanted to ensure that the best evidence problem didn't arise.

THE COURT: Let's go with Esteban, and if you have any problems or you wish to call Welsh after Esteban testifies, I'm not going to hold you to that. You can go ahead and call him.

MR. REICHEL: I'm going to ask for exclusion of witnesses, though, your Honor. That Inspector Welsh stay in the hallway during this testimony.

[10]

THE COURT: If he's the government's representative, I'll let him stay. Is he your case agent?

MS. SKIPPER: Yes, he is the case agent, your Honor.

THE COURT: I'll let him stay.

MS. SKIPPER: And the government has no objection to Mr. Reichel calling those witnesses if he wishes to. I have them present. He's welcome to call them.

THE COURT: How do you wish to proceed, Mr. Reichel?

MR. REICHEL: I'd like to just question Inspector Esteban on the Miranda matter.

THE COURT: All right. You may proceed.

PATRICK ESTEBAN,

a witness called by the Defendant, having been first duly sworn by the Clerk to tell the truth, the

whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. Have a seat on the witness stand. State your name for the record and spell your last name, please.

THE WITNESS: My name is Patrick Ray Esteban, E-s-t-e-b-a-n.

DIRECT EXAMINATION

BY MR. REICHEL:

Q. Thank you, your Honor. Mr. Esteban, I assume you were present during the search of Mr. Grubbs' home back in April of [11] this year?

A. Yes, I was.

Q. You were present with eight other law enforcement officers; is that correct?

A. About. About eight other law enforcement officers.

Q. Is there a reason you don't know exactly how many?

A. We had postal inspectors and Galt police officers there.

Q. Do you remember that day clearly or is there a problem with your recollection of the day?

A. I remember it clearly.

Q. Did you prepare a report in connection with your activity that day?

A. I prepared a memo. Memo of investigation.

Q. When did you prepare that memo?

A. Approximately two days—a day to two days after the incident.

Q. Have you reviewed that memo prior to your testimony here today?

A. Yes.

Q. Did you review it today?

A. About a week ago.

Q. Did it aid your recollection of the events?

A. Yes.

Q. Did it seem accurate when you reread it?

[12]

A. Yes.

Q. Okay. Ms. Skipper has told you that I have a motion to suppress the evidence in this case; correct?

A. Yes.

Q. And you know who Ms. Skipper is. She's the government prosecutor sitting there?

A. Yes.

Q. And you've spoken to Inspector Welsh about that fact; correct?

A. Yes.

Q. And the fact is I have a motion to suppress the evidence in this case?

A. Yes.

Q. Did you, in fact, review my written motion?

A. Yes.

Q. That was provided to you by Inspector Welsh?

A. Yes.

Q And you recall that motion highlighted the areas I thought there had been certain illegalities with the arrest and the search that day?

A. Yes.

Q. And after you read that, you then spoke to Inspector Welsh about that motion?

A. We discussed it.

Q. Is that the same as speaking to him about it?

[13]

A. Yes.

Q. And you discussed it with Ms. Skipper as well; correct?

A. Yes.

Q. And you discussed the fact that you were going to testify here today; correct?

A. Yes.

Q. Did you testify before the grand jury in this case?

A. No.

Q. And the report that you prepared, did you have plenty of time to prepare that report?

A. Yes.

Q. How many pages is it?

A. About one page.

Q. Okay. And did you—I mean you're trained to put everything that's important into that report; correct?

A. Yes.

Q. And if something was important that happened in that field for the case, you would put it in that memorandum; correct?

A. Yes.

Q. So it's fair for us to conclude that if it's not in the memorandum, it wasn't important; correct?

A. Yes.

Q. And, in fact, it's also very fair to conclude that if [14] it wasn't in the memorandum that it didn't happen that day; correct?

A. Yes.

Q. I'm sorry. I never received your memorandum so I can't cross-examine you on that today, but I need to know about the preparation of it. Okay?

A. Yes.

Q. And you've been trained in how to prepare those reports?

A. Yes.

Q. And you agree with me that the important material goes in there?

A. Yes, sir.

Q. Now, that day -

THE COURT: Is this a Jencks?

MR. REICHEL: I've never received the report from him, your Honor.

THE COURT: I know. But if the witness says that he reviewed something that refreshed his recollection, you can see it.

MR. REICHEL: I agree, your Honor.

THE COURT: You said you can't see it.

MR. REICHEL: I don't have it, your Honor.

THE COURT: Oh.

MR. REICHEL: I've never been provided with it.

[15]

THE COURT: Well, if he reviewed it, you're entitled to see it.

MS. SKIPPER: I was not aware that such a report existed. However, I'm informed that it may be in a bag down in my office.

THE COURT: Is that right, Mr. Esteban?

THE WITNESS: Yes, your Honor.

THE COURT: You're entitled to see it.

MR. REICHEL: I agree, your Honor. Perhaps I can question him for a while, then we can see.

Q. Now, that morning, do you recall that morning clearly?

A. Yes.

Q. That was back in April; correct?

A. Yes.

Q. What date was it in April?

A. I would have to see my memo again.

Q. Okay. That's okay. Did you receive a briefing from Inspector Welsh that morning about what was going to go on?

A. We received a briefing the night before and also in the morning.

Q. And you were gathered with—I'm telling you there was nine altogether, including yourself. Does that sound about right, nine law enforcement officers?

A. I believe so.

Q. And it's correct that for officer safety purposes and [16] just to have a more efficient search, you were wearing clothing which clearly identified you as law enforcement; correct?

A. Yes, sir.

Q. Did it say police on there?

A. Yes.

Q. Did it also say federal or U.S. Marshals?

A. It said United States Postal Inspector.

Q. And that's what you wore?

A. Yes.

Q. Is it a very vibrant color or outstanding? Is it black with yellow letters or something?

A. Wore blue raid jackets with gold lettering.

Q. Do you have a service revolver?

A. I have a service 9 millimeter pistol, sir.

Q. Which is a gun?

A. Yes.

Q. And you had your gun that morning?

A. Yes.

Q. And you had your gun, you have access to it, correct, it's on your belt or something?

A. Yes.

Q. Is there a holster that goes around you?

A. Yes.

Q. And the gun was in the holster?

[17]

A. Yes.

Q. Loaded?

A. Yes.

Q. And all of the other law enforcement officers that were there that day, they also had their weapons; correct?

A. Yes.

Q. And all of their weapons were loaded as well?

A. Yes.

Q. And they would be wearing them around their waist or on their body?

A. Yes.

Q. Okay. Now, that morning you saw the delivery of a package to the Grubbs residence; correct?

A. Yes.

Q. And after the delivery, you saw at least one officer go up to Mr. Grubbs who was outside of the residence; correct?

A. Yes.

Q. And do you recall which officer that was?

A. Tom Brucklacher. He is a postal inspector.

Q. Did you go with him at that time?

A. Yes.

Q. So you approached Mr. Grubbs?

A. Yes.

Q. Have you read Inspector Welsh's declaration about what happened that day?

[18]

A. Yes.

Q. He prepared a report about what happened that day; correct?

A. He prepared a presentation report.

Q. That's what I'm referring to.

A. I have not reviewed that report.

Q. Okay. You haven't. How about the criminal complaint in this case?

A. Yes.

Q. Did you read that?

A. Yes.

Q. And you recall that Inspector Welsh stated that Mr. Grubbs was approached outside his residence; correct?

A. Yes.

Q. And he was detained outside of his residence for a moment; correct?

A. Yes.

Q. And this is by law enforcement?

A. Yes.

Q. And, in fact, you were one of the people, one of the law enforcement?

A. Yes, I was.

Q. So this was the first officer you identified and yourself; correct?

A. Yes.

[19]

Q. Was there another one?

A. There was a Galt police officer.

Q. So there were three?

A. Yes.

Q. Now, there were additional officers who were then immediately coming to the residence as well; correct?

A. Yes.

Q. I mean it was timed to be that way; correct?

A. Yes.

Q. So if there were nine, there would be six additional officers coming to the front door of the residence; correct?

A. There were many law enforcement officers there, and Mr. Grubbs was with me at the corner of the residence. My attention was focused on Mr. Grubbs.

Q. There were how many vehicles would you say? At least four vehicles that pulled up to the house at that point?

A. Approximately three to four.

Q. And is it fair to say that things moved really quickly?

A. Yes.

Q. You don't want Mr. Grubbs to get away; correct?

A. No.

Q. You don't want him to destroy any evidence; correct?

A. No.

Q. You can agree with me that what's on your mind is he [20] may have that videotape on him; correct?

A. What's on my mind is he does not have any weapons, and he cannot hurt myself, other officers, or himself.

Q. And that's a very big concern of yours; correct?

A. Yes.

Q. So the first thing to do is to stop him, to detain him; correct?

A. Yes.

Q. And, in fact, that's what happened?

A. Yes.

Q. Put a stop on him right away?

A. Yes.

Q. And did you say to him—let me rephrase the question. I'm sorry. You heard someone say to him: You know why we're here, don't you? Correct?

A. Yes.

Q. You heard that. And Mr. Grubbs responded at that point; correct?

A. Yes.

Q. He responded yes?

A. Yes. Mr. Grubbs did say yes.

Q. Okay. And he then stated something else about yeah, the videotape, or something to that effect?

A. Something to that effect.

Q. Do you recall exactly what he said?

[21]

A. I believe he said do you know why—well, someone approached him. I believe it was Inspector Welsh. And it was about the videotape. And Mr. Grubbs stated, "Yes, I know why you're here. It's in the garage."

Q. Now, one of the things you did that day was record when his Miranda rights were read to him; correct?

A. Yes.

Q. And you agree with me that at this point his Miranda rights hadn't been read to him; correct?

A. At that point, no.

Q. So they had not been read to him?

A. Not at that point.

Q. Okay. At a later point did you witness his Miranda rights being read to him?

A. Yes.

Q. Did you put that in your report?

A. I believe I did.

Q. Okay. Now, in your Memorandum to Case File, if you put a time in there that something happened that was significant, would that time be accurate?

A. It's an approximation. Because my watch, I'm going off my watch, and my watch may be off a minute or two.

Q. I'm sure you're going to agree with me that if you put a time in your memorandum, that that was at least the time your watch stated; correct?

[22]

A. Correct.

Q. What I'm getting at, sir, is that you've stated that Mr. Grubbs was advised of his Miranda rights at 7:53 a.m. by Inspector Welsh. Okay? Does that refresh your recollection?

A. Yes.

Q. Do you want me to show you your Memorandum to Case File?

A. Sure, I'd like to see it.

Q. Okay.

A. That's all right. You could go over it with me.

Q. Do you recall that it was about 7:25 a.m. is when you approached Mr. Grubbs outside of the house that morning?

A. About that time, yes.

Q. If I were to tell you that your memorandum says 7:25, do you think that's right about the time you did?

A. May I see my memorandum?

MR. REICHEL: Absolutely.

Permission to approach this witness, your Honor?

THE COURT: Yes.

THE WITNESS: Yes.

Q. BY MR. REICHEL: The memorandum aside, do you think it was about 30 minutes before Mr. Grubbs was advised of his Miranda rights?

A. Looks like it approximately. 7:53. I write down at 7:53 a.m., Inspector Welsh advised Grubbs of his [23] constitutional rights per Miranda.

Q. Do you have any reason to think that it happened differently than what you put in your memorandum?

A. No.

Q. Okay. So as you sit here today, do you think it was approximately 30 minutes before Mr. Grubbs was read his Miranda after you first approached him; correct?

A. About that time.

Q. Okay. Thank you. Now, you understood that the officers were going to do a protective sweep search of the residence; correct?

A. Yes.

Q. And they were going to do that right away because that's the nature of the protective sweep; correct?

A. Yes.

Q. So you and I can agree that at least as soon as you you're talking to Mr. Grubbs out in front, the officers are already inside the house; correct?

A. Yes.

Q. But Mr. Grubbs had informed you when you first saw him that the videotape was in the garage; correct?

A. He made that statement, yes.

Q. And that's what you were there to search for was the videotape; correct?

A. Yes.

[24]

Q. And did you take—you took handwritten notes when he was being interviewed by Inspector Welsh inside the house?

A. Yes, I did.

MR. REICHEL: Your Honor, that's the questions I have for this officer.

THE COURT: Ms. Skipper, do you want to cross-examine?

MR. REICHEL: May I approach the witness just for a moment, your Honor, to take the memo back and take a look at it?

THE COURT: Yes.

CROSS-EXAMINATION

BY MS. SKIPPER:

Q. Inspector Esteban, when you first approached Mr. Grubbs outside the residence, did you speak with him?

A. When we first approached, Inspector Brucklacher told him to stop where he was, and I was there and I also told Mr. Grubbs to stop.

Q. At that time did he say anything or ask you any questions about being under arrest?

A. No.

Q. Did you tell him he was under arrest?

A. No.

Q. And did you perform a pat-down search or anything of that nature at that time?

A. Yes, I did. We walked Mr. Grubbs up to the corner, [25] corner of his house on the sidewalk, and I asked Mr. Grubbs if he had any weapons, and I patted him down.

Q. Now, at that time who was present with Mr. Grubbs?

A. There was also a Galt police officer there, and he was—it was basically a Galt police officer and myself.

Q. Now, at some point Inspector Welsh walked up to you; is that correct?

A. That is correct.

Q. And at that time do you recall what it was he said?

A. Something about—I just remember patting him down. I can't recall exactly what was said.

Q. Do you recall if he asked Mr. Grubbs any questions?

A. No.

Q. Now, when you were being questioned by Mr. Reichel, he asked you about a question or a statement that Inspector Welsh may have made. Do you recall Inspector Welsh walking up and saying to Mr. Grubbs: You know why we're here?

A. Right. Right. I was confused on the sequence of events there. Everything was going on so fast. I patted down Mr. Grubbs, and Inspector Welsh approached him and asked him, "Do you know why we're here?

Q. Did he say, do you know why we're here? It was a question that he asked? Is that what you recall?

A. To be honest with you, I'm a little nervous.

Q. Are you unsure about that?

[26]

A. I'm not unsure about that. Inspector Welsh did approach Mr. Grubbs and words were exchanged. Mr. Grubbs was cooperative. He was very cooperative. He said something about the tape being—I know why you're here, and it's in the garage, and Inspector Welsh said why don't we go talk about it inside.

Q. Now, at this time you were armed; am I right?

A. Yes.

Q. Was your gun drawn?

A. No, my gun was not drawn.

Q. And there were other law enforcement officers around at that time; is that right?

A. Yes.

Q. Were their guns drawn?

A. I don't believe so.

Q. And you said that Mr. Grubbs was cooperative; is that right?

A. Yes. He was very cooperative.

Q. Now, while you were outside the house, do you recall Mr. Grubbs questioning whether he was going to be handcuffed or whether he was under arrest?

A. Yes, I do.

Q. Can you tell us what occurred there?

A. Well, Mr. Grubbs was worried, and he said he did not want to be handcuffed in front of his children or his [27] neighbors. And I remember Inspector Welsh was there, and he reassured him, you know, we need to talk about this matter. Let's go inside. And we did not handcuff Mr. Grubbs as we walked him back into the house.

Q. Did Inspector Welsh tell Mr. Grubbs that he was under arrest?

A. No.

Q. Did he say that he was not under arrest?

A. No.

Q. Once you got inside the home, where did you go?

A. We went straight to the kitchen table.

Q. And who went to the kitchen table?

A. Mr. Grubbs, myself, and Gary Welsh.

Q. The other agents, were they in the room too?

A. Yes, but they were—they've already completed the protective sweep, and they're lining up for the search.

Q. Were they in the room, in the dining room where you, Inspector Welsh, and Mr. Grubbs were?

A. No.

Q. But they were in the residence?

A. They were in the residence, yes.

Q. And they were preparing to conduct the search?

A. Yes.

Q. Do you know what was occurring in between the time you say you first contacted Mr. Grubbs outside and you began the [28] interview of him in the dining room?

A. Yes.

Q. Mr. Reichel has brought up a 30- to 35-minute lag.

MR. REICHEL: Judge, this is really a leading question, I believe.

THE COURT: All right. Just ask the question.

Q. BY MS. SKIPPER: Do you know what occurred during that time.

A. Yes.

Q. What was occurring?

A. We were preparing to interview Mr. Grubbs.

Q. During the interview of Mr. Grubbs, the substantive part of the interview here, were you asking questions?

A. I was asking personal history questions, and I was taking notes. I initially took notes.

Q. When you say initially took notes and then asking—

A. I was just asking Mr. Grubbs his name, his date of birth.

Q. Did that occur before or after Inspector Welsh engaged in his questioning?

A. It occurred after.

Q. And you were present when Inspector Welsh gave Mr. Grubbs his Mirnda rights.

A. Yes, I was present.

Q. And at that time did Mr. Grubbs indicate that he [29] wanted to answer questions?

A. Yes. He was cooperative, and he just appeared anxious to give us information.

Q. Did you have your gun drawn at that point?

A. No. My gun was in its holster snapped.

Q. Did you draw your gun at any time during the execution of the search warrant?

A. No.

Q. Did Inspector Welsh have his gun drawn during this interview?

A. No.

Q. Did you see him with his gun drawn at any point during the execution of the search warrant?

A. No.

Q. Did you see any law enforcement officer with their gun drawn during the execution of the search warrant?

A. No.

Q. During the interview, I'm talking about the portion that Inspector Welsh engaged in, did Mr. Grubbs indicate that he wanted to take a break or wanted to stop the interview?

A. No. But I recall Inspector Welsh had asked him if he wanted water or use the bathroom, and Mr. Grubbs declined. And I know at one point I asked him that, too, during our interview.

Q. And when you asked him that, what was his response?

[30]

A. No.

Q. Can you describe his demeanor during the interview?

A. Well, he was very concerned, very anxious, but he was cooperative. He told us he wanted to talk and get this thing settled.

Q. Was he handcuffed at this point?

A. No.

Q. Were there other law enforcement officers maybe walking in and out of the dining room as this interview was being conducted?

A. I believe a few may have walked in and out.

Q. Did any of them have their guns drawn?

A. No.

Q. Do you know where Mrs. Grubbs, Mr. Grubbs' wife, was while you were conducting this interview?

A. I didn't see her during the interview. I believe she may have been in the living room.

Q. Do you recall getting the written consent to search the electronic storage media that were found in Mr. Grubbs' residence?

A. Yes.

Q. When did that occur during the execution of the search warrant?

THE COURT: I thought we weren't going to go into that.

[31]

MS. SKIPPER: I'm sorry. You're right. I saw the note, and I realized it was something I hadn't covered.

Thank you, your Honor.

Q. Do you recall how long the interview lasted?

A. Yes. It was about an hour.

Q. What occurred at the conclusion of the interview?

A. At the end of the interview, I pulled out my agency form, a personal history questionnaire, and I just went over it with Mr. Grubbs.

Q. Were you asking him questions?

A. Right. Additional questions like his spouse's name. And I just went through that form.

Q. Was Inspector Welsh present while you were asking him questions from the questionnaire?

A. I don't believe so. He was—

Q. He had left the room?

A. He had left the room, and he was communicating with other officers and agents there.

Q. At some point did he come back into the room?

A. Yes.

Q. What occurred then?

A. Right after I read off the personal history questions with him?

Q. Yes.

A. He was arrested. Mr. Grubbs was arrested.

[32]

Q. Was he told he was under arrest at that point?

A. Yes.

Q. Was he immediately placed in handcuffs?

A. Yes.

Q. Immediately after being told he was under arrest?

A. He was told to stand up, and then yes.

Q. Just one more question. Did you at any time observe Inspector Welsh giving Mr. Grubbs a copy of the search warrant?

MR. REICHEL: Objection, your Honor.

THE WITNESS: Yes.

MR. REICHEL: Beyond the scope of the direct:

THE COURT: Is that an issue that you wanted to address or not?

MR. REICHEL: Well, I thought it was addressed well enough in the pleadings, your Honor.

THE COURT: Go ahead then. If it's one that's still in issue, you may ask him questions about it.

Q. BY MS. SKIPPER: When did that occur?

A. That occurred as we were walking toward—as we came into the house, I cleared the table, this kitchen table. There were some objects on the table, and I just cleared it out. Mr. Grubbs sat down, and at that point Inspector Welsh produced the search warrant and put it on the table in front of Mr. Grubbs.

[33]

Q. Did he say what it was he was putting down on the table?

A. Yes.

MR. REICHEL: Objection, your Honor. Leading question.

THE COURT: Overruled.

MS. SKIPPER: No further questions, your Honor.

THE COURT: No, he didn't answer. I'm sorry. I was ruling so I didn't hear what he had so say.

THE WITNESS: Yes, he did tell Mr. Grubbs this is the search warrant.

MS. SKIPPER: Thank you, your Honor.

THE COURT: You may cross-examine on that and redirect on the rest of it.

MR. REICHEL: Thank you very much, your Honor.

REDIRECT EXAMINATION

BY MR. REICHEL:

Q. Inspector Esteban, in reviewing your Memorandum to Case File which I received just now, in there you stated that you drove up to Grubbs' residence, got out, identified yourselves as police and approached Grubbs.

Do you recall that?

A. Yes, I do.

Q. That happened?

A. Yes.

[34]

Q. He was ordered to step away from his vehicle, is the next sentence?

A. Yes.

Q. So that happened? It says, "Grubbs was compliant and did not resist." Correct?

A. Yes.

Q. Grubbs was told to step away from the house and was taken toward the corner; is that correct?

A. Yes.

Q. And that's what happened, that's what you recall that day?

A. Yes.

MR. REICHEL: Permission to approach the witness, your Honor?

THE COURT: What do you have there?

MR. REICHEL: His Memorandum to Case File. We have one copy. It's what I just got It's his written report two days after the search.

THE COURT: All right.

Q. BY MR. REICHEL: Inspector Esteban, I'm going to ask you if that report states anything in there about putting a search warrant on a table. Does it?

A. No.

Q. You reviewed that report prior to your testimony in this case; correct?

[35]

A. Correct.

Q. And that report doesn't mention anything about a search warrant being shown to a defendant; correct?

A. Correct.

Q. Did you talk to Inspector Welsh about what happened that day, and in that conversation with him recently, has he told you do you remember what happened with the warrant?

A. Yes, but I do remember—I do remember seeing that warrant folded put on that table. I do remember that.

Q. Let me ask you some questions. I appreciate it, but I want to ask you some questions first. Okay? You didn't put it in your report; correct?

A. Correct.

Q. Now, you read my motion that I filed in this case to suppress the evidence; correct?

A. Correct.

Q. And you remember my motion said they never showed my client the warrant; correct?

A. Correct.

Q. And then you spoke to Ms. Skipper first about this issue or was it Mr. Welsh first about this issue?

A. It was Inspector Welsh.

Q. I'm sorry. Inspector Welsh. What was the first conversation you had with Inspector Welsh after you read my motion? Where was it at?

[36]

A. It was at our office.

Q. And you talked about the fact that you may have to testify in this case; correct?

A. Correct.

Q. And you talked about the fact that you made handwritten notes of what happened that day; correct?

A. Correct.

Q. Do you still have your handwritten notes?

A. I believe they're with the case file.

Q. Okay. So they're in the file. And you and I agree that the reason you have these handwritten notes is to write down the important stuff; correct?

A. Yes.

Q. So you can put it into the report later?

A. Yes.

Q. So it can refresh your recollection?

A. Yes.

Q. So there will be no dispute later on what happened?

A. Yes.

Q. Thank you. And if it's not in your written report, do you believe they're probably not in your handwritten notes; correct?

A. It should be.

Q. It should be in your handwritten notes?

A. It should be.

[37]

MR. REICHEL: Okay. Can we get those notes?

THE COURT: Where are the notes?

THE WITNESS: They should be with the case file, your Honor.

THE COURT: Is that here?

THE WITNESS: I don't have control of the case file.

THE COURT: Is it in the U.S. Attorney's Office or where is it?

MR. REICHEL: Your Honor, we may have them. If I can show it to him and see if he can determine if these are his handwritten notes.

THE WITNESS: These are my notes. Yes.

THE COURT: Do you want to mark them for identification?

MR. REICHEL: Yes.

THE COURT: Defendant's Exhibit A for identification.

MS. SKIPPER: Your Honor, because that is the investigation file, perhaps we can remove those pages.

THE COURT: Only the pages that constitute his handwritten notes are marked Exhibit A for identification.

(Inspector Esteban's handwritten notes were marked as Defendant's Exhibit A for identification.)

Q. BY MR. REICHEL: Let me back you up in time that day.

[38]

After Mr. Grubbs was approached outside the house and there was a conversation about the videotape; correct?

A. Yes.

Q. And then we go into the house and there's this continuing conversation with Mr. Grubbs for an interview that lasts almost an hour; correct?

A. Correct.

Q. That interview concludes about an hour after it starts, and your report says that interview concludes around 8:55, I believe?

A. Yes.

Q. So your interview concludes about 8:55. At any time between 7:25 when you first approached and when the interview started at 7:50 something, Mr. Grubbs, in fact, asked you what's this about, what exactly is going on; correct?

A. I believe so.

Q. And you told Mr. Grubbs several times hey, it's better for you not to say anything. Something along those lines. Correct?

A. I don't recall that.

Q. Did you tell him we can't tell you right now?

A. I don't recall saying that.

Q. Do you recall saying you should just keep quiet for right now?

A. I don't recall saying that.

[39]

Q. Do you recall saying it's better for you to be silent?

A. I don't recall saying that.

Q. Well, you recall Mr. Grubbs definitely saying what exactly is this about, what's going to happen, what's going on?

A. I tried to calm him down because he was anxious.

Q. And he definitely said what's going on; correct?

A. I can't recall that.

Q. But something to that effect?

A. I can't recall that.

Q. Okay.

A. He was anxious about us being there and about law enforcement being there.

Q. Well, I'm going to provide you with your handwritten notes. And I can read your handwriting. But permission to approach the witness, your Honor?

THE COURT: Yes.

Q. BY MR. REICHEL: I'm showing you what's been marked as Defendant's Exhibit A for identification. This is going to take a few minutes,

Inspector, but I note in there there's no handwritten notes about showing a warrant to Mr. Grubbs. But I'd like you to verify that, because they're your handwritten notes.

A. I missed it. I guess I did not write that.

Q. How many pages are those handwritten notes?

[40]

A. Nine.

Q. Both sides or just one side?

A. There's one that takes up—the first page is written on both sides.

Q. Now, Inspector, you spoke with Ms. Skipper about your testimony here today, correct, before you testified?

A. Yes.

Q. You met with her?

A. Yes.

Q. You talked about this issue of whether or not Mr. Grubbs was shown the warrant; correct?

A. Yes.

Q. But it wasn't in your notes; correct?

A. Appears not.

Q. Nor your report?

A. It appears not, no.

Q. Did Ms. Skipper tell you that—excuse me.

Ms. Skipper, she discussed your anticipated testimony; correct?

A. Yes.

Q. And which you prepared for this hearing basically; right?

A. Yes.

Q. And you told her that you were going to testify that the warrant was shown to Mr. Grubbs; right?

[41]

A. Yes. From my visual recollection and my memory. I remember seeing that. I missed it. I missed writing it down.

Q. The table, was it a round table or a square table?

A. It was oval, oval type shape.

Q. And Mr. Grubbs was standing or sitting?

A. He was sitting.

Q. And where was Inspector Welsh?

A. Inspector Welsh was, I believe, on my left side.

Q. Were you sitting or standing?

A. I was sitting.

Q. And he was on your left. Where was Mr. Grubbs in relation to that?

A. Where I'm sitting here, Mr. Grubbs was sitting here. Inspector Welsh I believe was here. A couple times he would move over to this side closer to Mr. Grubbs.

Q. As you sit here today, do you actually recall what hand you handed him the warrant with?

A. With his left hand. I'm sorry. Can you rephrase that?

Q Yes. As you sit there today, do you actually recall what hand he handed Mr. Grubbs the warrant with?

A. Inspector Welsh?

Q. Yes, sir.

A. I think it was his left hand.

Q. Okay. Did you have any conversations with Mrs. Grubbs [42] that day?

A. No, I did not.

Q. And did you hear her talking to any of the other agents there were there that day?

A. I heard her voice, but I didn't hear what she was talking about.

Q. But she was definitely having conversations with them?

A. Yes.

Q. In fact, she was required to sit in a certain area of the house and she couldn't mill around the house; correct?

A. Some other people were with her, but I don't remember—I don't know what the circumstances were around that.

Q. What pocket did Inspector Welsh pull this warrant out of, that you recall?

A. He had it inside his jacket.

Q. Which-side? The right or the left side?

A. I don't know, sir. I just know that he took it out of his jacket.

Q. Okay.

A. I remember seeing him take it out of his jacket and put it on the table.

Q. Do you recall what Mr. Grubbs said in response to that?

A. Mr. Grubbs? I don't think he responded at all. He [43] just sat there.

MR. REICHEL: Thank you.

THE COURT: Redirect?

MS. SKIPPER: No, your Honor.

THE COURT: Thank you, Mr. Esteban. You may step down.

THE WITNESS: Thank you, your Honor. The exhibits, would you like me to—

THE COURT: Just leave them there.

Mr. Reichel, are you going to call any other witnesses?

MR. REICHEL: I don't think so, your Honor.

THE COURT: Is the government going to call any other witnesses?

MS. SKIPPER: Yes, your Honor. I was trying to avoid this eventuality, but I think I do need to call Inspector Welsh.

THE COURT: So you're not going to ask me to decide this today. You're going to ask me to take it under submission?

MR. REICHEL: Yes, your Honor. I have a witness that was not going to testify, but if Mr. Welsh is going to testify, I may call Mrs. Grubbs, and I would ask her three or four questions. And she would testify only about the issue of the warrant being shown or being present.

[44]

MS. SKIPPER: Well, then I think he should call that witness now.

MR. REICHEL: It's only based on Inspector Welsh's testimony. I'm willing to submit it at this point.

THE COURT: Well, it's up to you. Go ahead.

MS. SKIPPER: Inspector Welsh.

GARY WELSH,

a witness called by the Government, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows:

THE WITNESS: I do.

THE CLERK: Thank you. State your name and spell your last name for the record, please.

THE WITNESS: Gary Welsh, W-e-l-s-h.

MR. REICHEL: I'm sorry to interrupt, your Honor. If the earlier inspector is going to testify any further, he's in the courtroom observing the testimony.

THE COURT: He may testify if you're going to put this over. We have no way of knowing what's going to come up, so I think you better have Mr. Esteban step out of the courtroom.

MR. REICHEL: Thank you, your Honor.

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MS. SKIPPER:

Q. Inspector Welsh, you are a United States postal [45] inspector; is that right?

A. Yes, I am.

Q. Where are you presently assigned?

A. San Francisco, California.

Q. What is your present assignment?

A. I investigate child pornography trafficking and violations of child exploitation laws.

Q. Are you the child sexual exploitation specialist for the Northern California division?

A. Yes, I am.

Q. Are you the case agent on this case?

A. Yes, I am.

Q. Were you the affiant for the search warrant?

A. Yes, I was.

Q. So you were present at the execution of the search warrant; is that right?

A. Yes, I was present.

Q. And what was your first contact with Mr. Grubbs on that day?

A. As I approached in my vehicle, inspectors had already tentatively secured the outside front of the residence, I approached, and Mr. Grubbs was standing with Inspector Esteban on the northwest corner of the property on the sidewalk.

Q. Did you say anything to Mr. Grubbs at that time?

A. I walked up and introduced myself, and I paused and I [46] made the statement, nodding, "You know why we're here."

Q. Did you state that as a question?

A. No.

Q. Were you particularly aware of whether you stated that as a question or not?

A. Yes.

Q. Why?

A. Because I didn't want to ask any questions prior to Miranda.

Q. Did Mr. Grubbs respond?

A. Yes.

Q. What did he say?

A. He made a statement that he knew why we were here, the package was in the garage.

Q. Did you tell him he was under arrest at that point?

A. No. In fact, I assured him that he was not under arrest; that we were still investigating the matter.

Q. Did he express any concern about being handcuffed?

A. Yes, he did. He told me that he was embarrassed, and he didn't want to be handcuffed in front of his children or his neighbors. And I said well, there's no need to at this point that I can see, and I think we should move into the house and talk about the case as quickly as possible.

Q. Were you armed?

A. Yes, I was.

[47]

Q. Did you pull your gun?

A. No, I did not.

Q. Did you see any other guns drawn as you approached Mr. Grubbs?

A. No, I did not.

Q. Now, Inspector Esteban recorded a gap in between the first time he approached Mr. Grubbs and the beginning of the interview. Do you recall a similar gap as well?

A. The 30 minutes? There was approximately 30 minutes, I think, from the time we approached the house and sorted things out, got into the house, and Mr. Grubbs and I and Pat Esteban went in and

sat down. It was about 30 minutes I think all told before we began the interview.

Q. What was occurring during that period of time?

A. Well, we had to get in, we talked to his wife, explained to his wife why we were there. I made sure the kids got off to school on time. We checked their backpacks, of course, as per safety procedures and to make sure nothing was leaving the house. We took care of that. We went in, photographs were taken of the house, sketches, hand drawn sketches of the house had to be made. It took a while to clear things away from the table. We also had to deal with the fact that narcotics paraphernalia were found on the defendant plus on the table that we were about to do the interview on. So all told, I think all those preliminaries [48] took about 30 minutes.

Q. Where did the interview take place?

A. In the dining room of the residence.

Q. Was Mr. Grubbs seated at the table?

A. Yes, he was.

Q. And where were you?

A. I was sitting kind of kitty-corner from him, not on a 90-degree angle, but kind of off the table facing him.

Q. Was Inspector Esteban also present?

A. Yes, he was.

Q. And at that time had you placed Mr. Grubbs under arrest?

A. No, I had not.

Q. Did you discuss whether he was under arrest once you actually got into the dining room?

A. I again reassured him. He asked me if he was under arrest once we got in and sat down again, and I said no, no, but I would like to clear this up, and before we proceeded I went into Miranda.

Q. Did you give him a copy of the search warrant?

A. Yes, I did.

Q. And how did that occur?

A. Just as we were sitting down, I produced the search warrant out of my blue police jacket and set it on the table next to us, and I said we have a search warrant for your [49] house. These individuals will be conducting the search warrant at the same time we'll be talking about the matter.

Q. Did he respond to that in any way?

A. He didn't respond significantly either way, no.

Q. You mentioned a moment ago that you read him his Miranda rights. How did you do that?

A. Off my Miranda card that I keep in my credential case.

Q. And did he indicate a willingness to answer questions?

A. I read his Miranda rights to him. I asked him if he understood his Miranda rights. He acknowledged he did understand them, and I began questioning him about the matter.

Q. Now, you stated that Inspector Esteban, Mr. Grubbs, and you were in that room. Were there any other agents in the room?

A. No, not really. From time to time during the interview somebody may step in and ask me a question about what they were doing, but no other agents were in the room when we were conducting the interview as a whole.

Q. When other people came into the room, did any of them have their guns drawn?

A No.

Q. Is that something that you would recall if they had?

A Absolutely.

Q. How long did this interview take?

A Approximately an hour.

[50]

Q. And during that time did you or Mr. Grubbs take any breaks?

A. I may have stepped aside for a moment or two to answer some questions from some of the other search members, but I don't believe there was any real breaks involved.

Q. Did Mr. Grubbs at any time say that he wanted to take a break?

A. No.

Q. Did you offer him the opportunity to take any breaks?

A. Yes. At least once about midpoint during the interview I asked him if he needed anything, water, go to the bathroom or something.

Q. Did he respond to that?

A. He said he was fine.

Q. At any point during this interview, did he ask to see his attorney?

A. No.

Q. What was his demeanor during the interview?

A. Well, he was anxious, he was nervous, and he was concerned. And I guess overall he wanted to hurry up and get the interview over with and answer our questions and get on with it.

Q. Was he crying?

A. I don't recall him crying, no.

Q. Now, at some point—actually, I don't need to go [51] into that.

How did the interview conclude?

A. I think basically we said we didn't have anymore questions for him. We asked him if he had anything else to add. Anything that we may have forgotten to ask him that he thought may be of significance to us that would help us in our later investigations. After those questions were asked, I got up, I went out and checked on the status of the search with my search team, and then went outside and made a telephone call to you and updated you on the matter, and I came back in and let Pat Esteban finish doing his personal history statement. And at that time I informed him based on the evidence found and what he's told us, I was placing him under arrest for a violation of the child pornography laws.

Q. Now, at that time did you have your gun drawn?

A. Oh, no.

Q. Did anyone else come into the room with you with their guns drawn?

A. No.

Q. During this entire execution of the search warrant, did you see anyone with their gun drawn?

A. No.

Q. And in your experience in this sort of search considering Mr. Grubbs' assistance and the fact that he was not combative, would anyone have drawn their gun?

[52]

A. I can't imagine anyone under those circumstances that day at his residence drawing their weapon for any reason, especially since there was children present, his wife had already answered the door. The door was open by the time the bulk of the search team arrived. No, there was no circumstances at all in my mind that would warrant drawing a weapon.

Q. Did you have a copy of the warrant affidavit at the site of the search?

A. The search warrant affidavit, yes, I did.

Q. Were other members of the team made aware of the contents of the affidavit?

A. They were.

Q. How was that done?

MR. REICHEL: Objection, your Honor. Leading question. Ask that it be stricken.

THE COURT: Overruled.

THE WITNESS: The night before at our briefing in the hotel in Lodi, I required each and every search member to read the affidavit, understand the circumstances behind the investigation and the circumstances of the warrant.

Q. BY MS. SKIPPER: And one additional question. At some point during the execution of the search, did you speak with the defendant's wife?

A. Yes.

[53]

Q. When was that?

A. Just before I think I'd handcuffed Mr. Grubbs, and I was making some last minute instructions with my crew at that part of the room, I believe she was sitting in the livingroom, and I explained to her that we were placing her husband under arrest, and we were going to take him to Sacramento, to the Marshal's Office in Sacramento.

Q. Did she say anything to you?

A. She started to cry, and I said I'm sorry, you know, I know this isn't pleasant, words to that effect, and she said it's okay, I appreciate your professionalism up to that point, you know, since the events occurred. That's basically what she said.

MS. SKIPPER: That's all the questions I have, your Honor.

THE COURT: You may cross-examine.

MR. REICHEL: Thank you, your Honor.

THE COURT: This is subject to getting the Jencks statement, after which you may choose to reopen the cross-examination if you wish.

MR. REICHEL: Yes.

CROSS-EXAMINATION

BY MR. REICHEL:

Q. Inspector Welsh, you prepared an affidavit in support of the criminal complaint in this case; correct?

[54]

A. Yes.

Q. You signed it under penalty of perjury?

A. Yes.

Q. And it was filed with the Federal Court?

A. Yes.

Q. That was to support the arrest of Mr. Grubbs?

A. Yes.

Q. Okay. You put in there that you read him his Miranda rights; correct?

A. I believe I did, yes.

Q. And you put in there that he waived his Miranda rights and spoke to you?

A. I'd have to see the criminal complaint again. I haven't seen it since it was filed.

Q. Let me ask you a question while I get it for you. Do you recall putting in the criminal complaint that you showed Mr. Grubbs a copy of the warrant?

A. I don't think so.

Q. It wasn't in the criminal complaint?

A. I'd have to look at the complaint again, but offhand I don't think I put that in the affidavit.

Q. But you put in there that he waived his Miranda rights; correct?

A. Yes. Again, you're asking me questions. I'm going to have to look at the criminal complaint again. It's been [55] months and months.

Q. Well, let me ask you a question about that. It's been months and months since April 19th; correct?

A. Uh-huh.

Q. That's what you just said. And you can't remember exactly what went into the criminal complaint or not; correct?

A. Well, I want to speak accurately to your question. If I could see the complaint, I would be able to give you a more accurate answer.

Q. Let me ask you a question. You agree with me that it's been months since the arrest; correct?

A. I agree with you.

Q. You agree with me that it's hard to answer directly what you put in the criminal complaint unless you have a chance to read it right now; correct?

A. Well, if I read the criminal complaint as it sits in front of me now, I could probably answer quicker, and my memory would be much more refreshed than it would if I didn't have it after months and months as you say.

Q. I think we agree at this point. Now, there's a reason for that; correct?

A. I don't know. I don't know what your reason for your question is.

Q. Okay. The reason you'd be better at answering the question about the criminal complaint if you had it in front [56] of you is because there's been a passage of time since the arrest; right?

A. There has been a passage of time. I agree.

Q. Secondly, you've been involved in a lot of cases since then; right?

A. A number of cases, yes.

Q. And not all cases are the same; correct?

A. Correct.

Q. They have different facts?

A. Yes.

Q. And, in fact, that's one of the reasons we write reports down of the important things that happened; right?

A. Well, we write reports because we're required to by our agency.

Q. Let me ask you. If your agency didn't require you to write a report, would you not write them?

A. I'm not sure what I'd do if my agency didn't require me to write a report. I probably would. If I had my own law enforcement agency or something, yes, I'd probably document.

Q. Well, let's say you worked as a postal inspector, but your agency didn't require you to write a report. Would you still write a report?

A. If I could perform my job without writing a report and I could do it as accurately and as professionally and as well as I could without writing a report, I probably would. But [57] that wouldn't happen because I don't think I could perform my job without memorializing things that happened.

Q Okay. Well, without me showing you the criminal complaint that you drafted on the day he was arrested, you couldn't accurately talk about what was in there; correct?

A. For the most part I could.

Q. But some things you wouldn't be able to?

A. Well, I don't know.

Q. I understand.

A. I mean if you ask me a series of questions, and I read the criminal complaint, whether I don't read the criminal complaint, I think I probably—my

reasonable conclusion would be I'd probably be more accurate over a period of time answering your questions on the criminal complaint if it was in front of me.

Q. Do you have anything else?

A. You're asking the questions. Go ahead.

Q. Thank you. Now, you also prepared a report called a presentation report; correct?

A. It's called a presentation letter.

Q. Presentation letter.

MR. REICHEL: Permission to approach, your Honor? I'm going to show him what's going to be marked as Defendant's Exhibit B for identification.

THE COURT: You may approach the witness [58]

MR. REICHEL: Thank you, your Honor.

Q. I'm going to show you the—I think this is the presentation report. Do recognize what I've just placed before you?

A. Yes.

Q. Is that what we call the presentation report?

A. Yes.

Q. And you and I can agree, I believe—

A. It's the presentation report without exhibits.

Q. The presentation report without exhibits. And you and I can agree that the important stuff should be put in that report?

A. I would say yes.

Q. And you and I can also agree that the unimportant stuff doesn't have to be in the report; correct?

A. Unimportant stuff? It depends on what the stuff is. I mean things go in the report that I feel are relevant to the investigation.

Q. Have you read this recently in preparation of your testimony?

A. It's been a week and a half since I read it.

Q. Do you recall—let me just get to the point.

There's no discussion in there whatsoever that you provided Mr. Grubbs a copy of the warrant that day?

A. No. I do remember I didn't see that in there. I [59] remember that a week and a half ago when the subject came up.

Q. Okay. So it's not in there; correct?

A. No.

Q. Thank you. And do you agree with me the important material should be put in that report?

A. Yes.

Q. And you agree with me that if something didn't happen, it can't make its way into this report; right?

A. Absolutely.

Q. So if something is important and it happened, it should be in the report; correct?

A. Probably it should be in the report.

Q. Thank you. You prepared a declaration in this case; correct?

A. Yes.

Q. And let's talk about the declaration. It's under penalty of perjury; correct?

A. Correct.

Q. It's filed on September 13th?

A. I'd have to look at the declaration.

Q. I'm going to give it to you in a minute. It's on file. I'm going to mark it as Defendant's C. You had prepared this after I filed my motion to suppress the evidence; correct?

A. I believe so, yes.

[60]

Q. Do you have any doubt about that?

A. I'd have to look at the dates on both the declaration and your motion, but I think it was filed subsequent to your motion.

Q. Was it drafted at the request of Ms. Skipper, the prosecutor?

A. Yes.

Q. And you had a copy of my motion and read my motion?

A. Yes. She faxed it to me, yes.

Q. And you and I would definitely agree that when you're going to draft a declaration, that you're at least going to highlight the issues I've read and add factual background for the Court to decide?

A. Well, as a matter of fact, I did not read your motion. I was busy that day. I had to get out of work. She asked me to write a declaration based on what occurred that day, don't leave out any details, be as accurate as possible. I believe I did that. When I went back after I did the declaration, I looked and I called AUSA Skipper and I said the motion you sent me is missing two pages. That was after I finished my declaration. She refaxed the missing pages to me, and I read your declaration.

Q. Okay. Now, this one was under penalty of perjury, this declaration, and it was done at the request of Ms. Skipper. And it was done in response to my motion to [61] suppress the evidence. Correct?

A. That's my assumption, yes.

MR. REICHEL: Permission to approach, your Honor, and to show him what's marked as Defendant's Exhibit C.

THE COURT: Yes, you may.

MR. REICHEL: Thank you.

Q. Do you recognize that Exhibit C which I've just set before you?

A. Yes.

Q. And Ms. Skipper said to put all the important facts in there, you just told us; correct?

A. She told me to put as much as I remembered.

Q. Okay.

A. And put in everything I could remember. That's right.

Q. Now, my next question is paragraphs 12 and 13 on page 2.

A. Yes.

Q. Specifically paragraph 13.

A. Uh-huh.

Q. It says, "I removed the copy of the search warrant intended for Grubbs from under my police nylon jacket."

Correct?

A. Yes.

Q. "The copy of the search warrant was folded in thirds, in legal sized letter fashion." Correct?

[62]

A. Right.

Q. And it doesn't say anything in there whatsoever about you telling Mr. Grubbs this is the search warrant; correct?

A. No.

Q. Notice paragraph 14. It says, "I placed the search warrant on the table."

A. Yes.

Q. And you notice in there it doesn't say anything in there about you telling Mr. Grubbs this is the search warrant for your house and all these officers are going to now search the premises; correct?

A. It wasn't a search warrant. It was a copy of the search warrant. And I set it on the table, and I explained to Mr. Grubbs we have a search warrant for your house, I showed him the paper. When I fold it, I always have the United States Government, United States of America portion at the top of the letter, top of the text so you can see it. When I tri-fold it, I set it down. I don't know if I spent a lot of time pointing to it saying this is the actual document or anything like that, but I did set it on the table.

Q. Okay. We all agree you set it on the table; correct?

A. Yes. I don't know. I agree. That's what I'm remembering.

THE COURT: I don't think we all agree. I don't think you agree, do you?

[63]

MR. REICHEL: No, your Honor.

Q. How about we all agree that you're testifying you placed it on the table. Let me ask you. There's nowhere in the declaration anything about a conversation of the search warrant with Mr. Grubbs other than the phrase "I placed the search warrant on the table." Correct?

Just looking at paragraph 14.

A. No, there's nothing in 14.

Q. Is there anywhere else in that declaration that conversation you had with Mr. Grubbs? In that in this declaration somewhere that I'm missing?

A. That I informed him we had a search warrant?

Q. Yeah.

A. No, not in this declaration.

Q. Thank you. So it's not in any reports, correct, the conversation you had with Mr. Grubbs?

A. You have to be a little bit more specific.

Q. You told Mr. Grubbs this is the search warrant for your house, number one, and additionally these officers are going to search pursuant to this search warrant?

A. I said here's a copy of your search warrant, and then I explained to him what the officers were doing, I explained to him why we were there, and went on from there.

Q. I'm going to call that a conversation about the search warrant with Mr. Grubbs. Okay?

[64]

A. Okay.

Q. That wasn't in any report; correct?

A. I don't see anything that you've given me now.

Q. Well, what I've given you is Exhibits A, B, and C. And those don't seem to reflect it; correct?

A. Those particular words that you're looking for I can't find them in the declaration or my presentation letter.

Q. Right. But they came out today in your testimony?

A. Yes.

Q. Now, you spoke to Ms. Skipper about your testimony in this case; right?

A. Sure.

Q. And you knew a very important thing was whether or not Mr. Grubbs was given a copy of the warrant; right?

A. Yes.

Q. That's why we're here today; right? One of the reasons.

A. I know why I'm here today, but go ahead.

Q. Did Ms. Skipper talk about that subject with you, whether you gave him a copy of the warrant?

A. She said that was one of your concerns, and that was in the motion.

Q. And you talked about what you were going to testify to today; correct?

A. Yes.

[65]

Q. Okay. Let me ask you to take a look at what's been marked as Exhibit B. And that is your presentation report without exhibits.

A. Yes.

Q. Do you notice on page 8 down at the bottom paragraph 39?

A. Yes.

Q. And in there you wrote, last sentence, "Inspector Brucklacher immediately approached

Grubbs and verbally detained him as the entry search team moved in."

A. Yes.

Q. And that's accurate?

A. Yes.

MR. REICHEL: Thank you. I believe I have nothing further, your Honor, from Inspector Welsh.

THE COURT: Any redirect?

MS. SKIPPER: Briefly, your Honor.

REDIRECT EXAMINATION

BY MS. SKIPPER:

Q. Inspector Welsh, you testified that you prepared that declaration at my request; is that right?

A. Yes.

Q. Now, shortly after preparing that declaration, did you leave the state?

A. Yes.

[66]

Q. How long were you gone?

A. Two weeks. Approximately two weeks.

Q. Do you recall if you read Mr. Reichel's motion before or after you returned from vacation?

A. I thumbed through it before. I didn't read it until—actually, I didn't read it until about a week ago.

Q. Are you aware as a law enforcement officer—well, let me ask you this first. Have you participated in the execution of search warrants as a postal inspector other than the search warrant at Mr. Grubbs' residence?

A. Yes.

Q. Can you estimate how many you've participated in?

A. 75 to 80. I'm sorry. Are you talking about child exploitation warrants, or robbery warrants, or all the warrants that I've done?

Q. Let's confine it to child exploitation warrants, if you can.

A. Probably 60 to 75.

Q. And have you participated as the lead agent in the execution of search warrants other than the one at Mr. Grubbs' residence?

A. Yes.

Q. Do you know how many approximately?

A. 50.

Q. Were you aware before you read Mr. Reichel's [67] memorandum of your obligation to present a copy of the search warrant?

A. Yes.

Q. To the defendant or the resident?

A. Has to be left at the residence at the very least.

Q. And you testified earlier that you include in your report information that you believe is relevant to your investigation; is that right?

A. Yes.

Q. Do you consider your performance of the obligation to leave a search warrant to be relevant to your investigation?

A. Yes.

Q. So why was that information not included in your report?

A. Well, if I had to venture an answer, it'd probably be because it's very routine, I do it every time. I leave a copy of the warrant at the residence. It's not something that avails to the investigative matter. Just like I say I did not see any guns drawn. I didn't put that in the report either. Or I didn't find this or that. I put in the report what I think is germane to the prosecution of the defendant.

MS. SKIPPER: No further questions, your Honor.

THE COURT: Any recross?

MR. REICHEL: I don't think so, your Honor.

THE COURT: Thank you, Mr. Welsh. You may step down.

[68]

MR. REICHEL: Your Honor, I was going to call Ms. Grubbs, but she's got two children, and she's run out of child care for today.

THE COURT: Is she here?

MR. REICHEL: Yes.

MS. SKIPPER: It was my understanding that Mr. Reichel only had three or four questions for her.

THE COURT: Is she here now?

MR. REICHEL: Yes.

THE COURT: Why don't you go ahead and call her.

MR. REICHEL: Okay. Your Honor, calling Carol Bradstreet to the witness stand.

MELBA CAROL BRADSTREET,

a witness called by the Defendant, having been first duly sworn by the Clerk to tell the truth, the whole truth, and nothing but the truth, testified as follows: With.

THE WITNESS: Yes.

THE CLERK: Have a seat up here on the witness stand. State your name and spell your last name, please.

THE WITNESS: My name is Melba Carol Bradstreet, B-r-a-d-s-t-r-e-e-t.

DIRECT EXAMINATION

BY MR. REICHEL:

Q. Ms. Bradstreet, were you present on April 19th when the house was searched?

[69]

A. Yes, I was.

Q. And it was around 7:30 in the morning or so?

A. It was about 7:15.

Q. And I want to ask you about what happened when the officers came to the front door that morning. Okay?

A. Okay. I got ready to take the boys to school. I usually leave the house about 7:30, 7:20, 7:30, depending on whether they have breakfast at school or not. And when I went out the door towards the driveway, I noticed my car was pinned in, and all these officers were kind of swarming all over, and I didn't know what was going on. I was just total shock. And the kids, I didn't know—I looked at the kids, I'm thinking what are they going to think, what's going on. I have no idea what's going on here.

And I said, "I don't know what's going on, but I'd like to take the kids to school." Well, then they said, "We need to look in the children's backpacks before they go to school." So they took each of the

backpacks, and they went through the backpacks. And then they said, "You can take the children to school, but come right back." So I took the kids to school. I said, "Don't worry. We'll find out what's going on. You'll be okay. I'll pick you up this afternoon." So I took the kids on to school, I came back, pulled in the driveway. By this time when I came home, all the officers and Jeff were in the house.

[70]

Q. Are you reading from something?

A. No.

Q. What is it you have in front of you?

A. I didn't look at it.

Q. What is it?

A. It's—I don't know what it was.

MR. REICHEL: Oh, I'm sorry. I thought it was something you brought up there with you. That's our stuff. I'm sorry. I apologize.

May I approach the witness, your Honor?

THE COURT: Yes.

MR. REICHEL: Sorry. She was looking down, and I thought she was reading from something she had brought.

Q. So when you came back from the school, be—

A. So when I came back from the school, I had pulled the car in the driveway, there was nobody outside at this time, and I went on in the house. And at this time they had Jeff in the dining room, because I looked around and there was people all over the place. I mean there was officers. I didn't know who was there. I mean I was just kind of in shock. And I said, "What's going on?" And they wouldn't tell me. And I started to go upstairs, I don't know why, and they said, "Well, you can't do that. Go sit down." And I said, "Well, what's going on?" And they wouldn't tell me. And she says, "I can't tell you anything." And I said, "What are you doing [71] here What's going on?" And this went on all day long. And they never told me what was going on. I never saw a piece of paper. There was nothing. And then I asked if I could do something, and she said, "Well, don't you want to watch TV or something or call somebody?" And I said, "No, I don't want to call anybody. You know, what's going on?" And this is later they said I could call somebody if I wanted somebody to be there with me or something. But I just kept asking what was going on, and they went in the kitchen.

MS. SKIPPER: Objection, your Honor. This is turning into a narrative.

THE COURT: It's a pretty long narrative. Why don't you confine the questions to what you want her to address.

Q. BY MR. REICHEL: So tell the Court, did you ask the law enforcement officers there what was going on?

A. Yes, I did.

Q. Did you ask them that from the minute you got back from taking the—

A. Yes, I did.

Q. Until—

A. I continually asked.

THE COURT: Wait, wait. I know you're a little nervous here. But wait until he finishes the question and then just answer his question.

THE WITNESS: Okay.

[72]

Q. BY MR. REICHEL: You asked them when they first came to the house that morning when you still had the children there?

A. Yes.

Q. And what did they say to you?

A. They said, "We can't tell you anything."

Q. You left to take the kids to the school?

A. Yes.

Q. How much time before you were back at the house?

A. Seven minutes maybe. Seven to ten minutes maybe.

Q. And did you ask them again what's going on?

A. Not until I came back from taking the kids to school.

Q. Did you ask to see—did you say do you have a warrant?

A. No, I didn't. I was so stunned and so startled and so in shock, I didn't know what to say. I saw these people in uniform.

Q. Is it the case that you asked them throughout the time of the search what was going on and what were they there for?

A. Yes.

Q. Did they ever answer that? What did they answer?

A. They just said they couldn't tell me.

Q. Was there a point at which they eventually changed that?

A. No. They just—before me left, they left me the [73] search warrant, copy of it, and an attachment of what they took. They said, "We'll leave you this attachment of all the things that we took." And I didn't even know what they were there for. I still didn't at that point.

Q. And that was when they left?

A. Yes.

Q. And how many pages was the warrant that you got?

A. I think the warrant itself was like one page. And the attachments as far as what they took, the inventory, was several pages. But I don't recall exactly. I have it at home.

Q. And was it folded up when it was given to you?

A. Yes.

Q. Did you have to unfold it?

A. Yes.

Q. What time did the search end, if you remember?

A. About 1:30. They didn't even tell me they were taking the kids. That they had taken them already.

Q. Were you prevented from freely moving in the house during the search?

A. Yes.

Q. And you saw Jeff at the table being interviewed by them?

A. Yes.

MR. REICHEL: Thank you, your Honor. No further [74] questions for Ms. Bradstreet.

THE COURT: Any cross-examination?

MS. SKIPPER: Just very briefly, your Honor.

CROSS-EXAMINATION

BY MS. SKIPPER:

Q. Ms. Bradstreet, do you recognize Inspector Welsh? Would you please stand up. Do you recognize this gentleman from the execution of the search that day?

A. He looks familiar.

Q. Do you recall speaking to him at any time during that day?

A. You know, he looks familiar. I spoke to so many that I don't recall who is who really. He looks familiar.

Q. At some point during that day do you recall someone coming to you telling you that they were going to be taking Mr. Grubbs, that he was under arrest, and they were going to be taking him to Sacramento?

A. Just before they took him.

Q. And do you recall if they told you why they were taking him, what he was under arrest for?

A. No.

Q. They did not tell you that?

A. No.

Q. Okay. At any time, even after he was taken away, after he was arrested and removed from the residence, is it [75] your testimony that no one told you what—

A. No.

Q. Just let me finish the question first.

A. Okay.

Q. Was it your testimony that no one informed you why he was under arrest or what the focus of the search was?

A. No.

MS. SKIPPER: No further questions, your Honor. One more. I apologize.

Q. During the time that you were in the home and they were executing the search, did you ever see any law enforcement officer with his gun drawn pointing it at Mr. Grubbs or anyone else?

A. No.

Q. Did anyone ever point a gun at you?

A. No.

MS. SKIPPER: No further questions.

THE COURT: Anything else?

MR. REICHEL: Nothing further, your Honor.

THE COURT: Thank you, Ms. Bradstreet. You may step down.

Mr. Reichel, doesn't that answer your issue on the search warrant, leaving it there?

MR. REICHEL: It depends on if we're done taking evidence, your Honor, before we argue the case.

[76]

If there's a potential issue, I don't want the government to be able to hear what I have to say, put a witness on who is going to testify exactly to the area that I've brought up.

THE COURT: All right. Well, I'm in the dark. I thought you were claiming that Rule—

MR. REICHEL: 41(d).

THE COURT: 41(d) was violated. Rule 41(d) requires that the officers leave a copy of the search warrant. And that's what she said they did.

MR. REICHEL: There's case law also, your Honor, that says they should show it to the individual at the outset of the search. There's case law that says they should show him the affidavit as well.

THE COURT: Where is that case law?

MR. REICHEL: I believe that's in Gantt, your Honor.

MS. SKIPPER: There is Ninth Circuit case law that does state that you are supposed to show the search warrant at the outset.

THE COURT: Okay. If the Ninth Circuit wants to rewrite the statute, that's up to them. That's fine. I didn't realize that.

MS. SKIPPER: Yeah, there is case law to that effect. Mr. Reichel is correct. It would seem to me, at least with regard to the search warrant issue—

[77]

THE COURT: What does the Ninth Circuit say you're supposed to do if nobody is home when they do the search?

How do they write that into the statute? Do they have an answer for that?

MS. SKIPPER: I believe in that instance, you're supposed to leave a copy at the residence. But if there is someone present, the Ninth Circuit case law is clear that you're supposed to present it to them at the beginning of the search warrant as opposed to the end.

THE COURT: All right. I apologize for having such a silly reading of Rule 41 (d) that I would even suggest that it would suffice to leave it at the end. Obviously, you have to leave it at the beginning. That's what it clearly says.

MS. SKIPPER: I believe the case law is cited in our briefing, and perhaps the rationale may be somewhat convincing to you.

THE COURT: All right. It doesn't make any difference. It's binding.

MS. SKIPPER: With regard to that issue alone, irrespective of Miranda at this point, I'm not sure what difference the grand jury transcript would make on this issue.

THE COURT: We don't know what he said. He might have said something different. He might have said at the grand jury that he left it at the end, in which case it would be clearly in violation of the plain language of section 41(d).

[78]

MS. SKIPPER: You're correct, your Honor. I was kind of assuming, because I was present, I was kind of assuming that knowledge. But you're right. And so that issue would remain open as well as the Miranda issue if Mr. Reichel can find any inconsistency in the agent's testimony today and his testimony before the grand jury.

THE COURT: So I guess you have to do it twice under the reading of 41(d), because it says the officer has to do two things. He has to give the person from whom or from whose presence the property was taken a copy of the warrant, and the Ninth Circuit says you have to do that at the beginning of the search. Then it says you have to give him a receipt for the property taken, so you have to do that at the end of the search. So you can't do it all at once. There has to be two.

MS. SKIPPER: That's my understanding of the Ninth Circuit law. It has to occur at the beginning, and then the receipt has to be given before you leave, or left at the residence.

THE COURT: All right.

MS. SKIPPER: That leaves a factual issue, obviously, of whether or not Mr. Grubbs was given a copy of the search warrant in the dining room; whether he was or he was not.

THE COURT: Well, if he doesn't testify, I don't know that there's any dispute on that.

MS. SKIPPER: He hasn't filed a declaration, your [79] Honor.

MR. REICHEL: I'm fine with the facts, your Honor. I think the facts support—the undisputed facts on the report, I think, support my position.

THE COURT: All right. So do you want to continue this hearing to next Wednesday at the end of the calendar?

MS. SKIPPER: I think that should be fine, your Honor. I'm just thinking if I'm going to be back in town. Yes, I will be back. And we can continue it to next Wednesday. I will be flying out of state Thursday morning. However, I will leave instructions as soon as the transcript is available that it will be both faxed and sent over to Mr. Reichel so he'll have an opportunity to review it before Wednesday.

THE COURT: All right. Then we'll take the rest of the evidence, if there's going to be additional evidence, at that time.

MS. SKIPPER: Your Honor.

THE COURT: Mr. Welsh should be present here in case there's further cross-examination at that time.

MS. SKIPPER: I will have him present, your Honor. Should Inspector Esteban be present as will? He didn't testify before the grand jury.

THE COURT: Not unless you want him to testify.

MR. REICHEL: I don't think I need him, your Honor.

THE COURT: So it would be Mr. Welsh and any other [80] witnesses that Mr. Reichel is going to call, and then argument on the law.

MR. REICHEL: I know Ms. Skipper is going to be out of town so it's a little unfair to her, but if I filed something to kind of succinctly restate my points and point to some of the applicable law from the facts I think that are already in the record and not in dispute.

THE COURT: Why don't you do that, because that's what you'll be doing anyway, and it will just give me a head's up on what your arguments are. I was being somewhat factitious here about the rule, but it would help to have you point to the—

MR. REICHEL: It isn't in the text, your Honor.

THE COURT: No, I know. It would help to have you point to the parts of the case law that you want me to focus on.

MS. SKIPPER: In fairness to the government, if he could have that available in my office on Monday so that when I get in on Tuesday morning, I'll have an opportunity to read that, I would appreciate it.

THE COURT: All right. So you give it to me and the U.S. Attorney's Office by Monday.

MR. REICHEL: Yes, your Honor.

THE COURT: All right. Anything else at this time?

MR. REICHEL: That's it for today.

[81]

THE COURT: Thank you.

MS. SKIPPER: Thank you, your Honor.

MR. REICHEL: Thank you very much, your Honor.

(Proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

FURTHER HEARING RE MOTION TO SUPPRESS

WEDNESDAY, OCTOBER 23, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

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[1]

SACRAMENTO, CALIFORNIA

WEDNESDAY, OCTOBER 23, 2002, 9:00 A.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for further evidentiary hearing, your Honor.

MS. SKIPPER: Good morning, your Honor. Camil Skipper for the United States.

MR. REICHEL: Good morning, your Honor. Mark Reichel with the Federal Public Defender's Office. Mr. Grubbs is present and out of custody.

THE COURT: Are there any other witnesses to be called in this hearing?

MR. REICHEL: Well, your Honor, I don't know if the Court got a chance to look at my pleading that was filed Monday. And I'll get to the point. One of the important issues in this case was what was served on the Grubbs' residence that day. And Ms. Grubbs testified—or excuse me, not Ms. Grubbs—Ms. Carol Bradstreet testified at the evidentiary hearing that she received a copy of the search warrant that day at the end of the search warrant. She testified that she received a one- or two-page document, and that's all that she got. She also testified that she has it at home, and she didn't bring it with her. The next day she delivered to the Federal Defender's Office what she received. [2] And it is a folded up search warrant. I have it with

me. I brought it here today. It's in the envelope she brought it by with. And it does not have the affidavit attached to it. It's a copy the warrant itself. A copy of the search warrant. It doesn't have the affidavit in support of it, which is I think about 25 pages. But the Court and the government need to look at it because there are holes missing where clearly there was a staple in it at some point. Ms. Bradstreet is here today to testify about the circumstances of that. The proffer would be that she received it, she put it in the house, she didn't touch it, didn't alter it, didn't tamper with it in any way. And then after she testified, she told me she would bring it to the office the next day, and that she did. And that's the exact condition she received it in.

THE COURT: Does your case law stand for the proposition that the affidavit has to be left also?

MR. REICHEL: I think it's very important that—I don't know if the case law says the affidavit has to be left, but the case law is clear that the affidavit has to accompany the warrant when it's shown to the individuals at the premises. And the case law is clear that the affidavit has to attach—excuse me—has to accompany the warrant, especially if it's an anticipatory search warrant.

MS. SKIPPER: That's not the case law, your Honor.

THE COURT: Sometimes the affidavit is sealed.

[3]

MS. SKIPPER: I'm sorry. Counsel is simply wrong. I believe that he's relying, or at least what he cites in his brief for the preposition that 41(d) requires that the affidavit accompany the search warrant is the Gantt case. And that's simply not what the Gantt case says. What he's relying upon is footnote 7 in the Gantt case which does require that at the presentation of the affidavit, in order to comply with Rule 41(d), the officer should have shown them attachment A.

Defense counsel in his brief in parentheses after "attachment A" says "affidavit," I believe. But that's not what attachment A is. If you look at the Gantt case, which I did, the Gantt case clearly identifies attachment A as the two-page typed list of items to be seized, including the specific kind of envelopes, paper, and postage stamps, et cetera. That's what had to be attached.

THE COURT: Well, let's find out, because we're behind today and we have a jury waiting in another case. If there's going to be any other testimony, let's take that now so that your witnesses don't have to stay around, and then we can decide how we're going to deal with these legal questions.

MS. SKIPPER: I'm not sure there needs to be any testimony, your Honor. We'll concede the fact that the affidavit wasn't presented to either Mr. Grubbs or Ms. Bradstreet.

THE COURT: Why don't you see if you can enter into a [4] stipulation, we'll put that on the record, and then you can decide whether there's any other evidence to be presented.

MR. REICHEL: That's fine. I think what she just said is they would concede that the affidavit wasn't presented to Mr. Grubbs and it wasn't presented to Ms. Bradstreet or left at the residence, is a stipulation I would enter into.

THE COURT: Is that the stipulation?

MS. SKIPPER: Yes, your Honor. We'll concede that.

THE COURT: Then the Court will accept that stipulation; i.e., that the affidavit was not presented to Ms. Grubbs, Mr. Grubbs, or left at the premises.

MS. SKIPPER: Yes, your Honor. It was not.

THE COURT: Then do you want to file a written response to his most recent brief if there's some legal issues you want to address?

MS. SKIPPER: I'll be happy to do so, although I have the Gantt case here with me.

THE COURT: Well, is the issue whether the affidavit has to accompany the search warrant? Is that the issue?

MS. SKIPPER: That's the issue as defense counsel framed it. He has said that. Gantt requires that at the time the search warrant is presented,

the affidavit is to be attached. And he cited Gantt, page 1001, footnote 7, for that proposition. And what I'm saying is that he has misinterpreted the case law, because they say attachment A had [5] to have been attached, but the case does not identify the affidavit as attachment A. It identifies the list of items to be seized as attachment A, and that was attached to the search warrant in this case. The affidavit need not be presented.

THE COURT: Rule 41(d) has existed in essentially the same form for several decades, and I would think there would be some case law that would clearly set forth whether the affidavit has to accompany the search warrant. My personal understanding based on experience is that it seldom does, because I think oftentimes the affidavit is under seal. There are many times that for purposes of safety and other reasons officers don't want, and the United States Attorney doesn't want, whoever happens to be at the house to read affidavits in support of a search warrant. So I'd like to have some clear law which I think must exist out there on this question, if that's the issue. Is that the issue, Mr. Reichel?

MR. REICHEL: That's one of the issues. We do have about six issues, I believe, in the air on this case. But that is one of the issues, yes, your Honor.

THE COURT: Why don't you file something on that, Ms. Skipper.

MS. SKIPPER: I will, your Honor.

THE COURT: Do you want to put it over two weeks?

MR. REICHEL: Yes.

[6]

THE COURT: Mr. Grubbs is not in custody, is he?

MR. REICHEL: No.

THE COURT: All right. So you have no objection to putting it over two weeks?

MR. REICHEL: No, your Honor.

THE COURT: Any objection?

MS. SKIPPER: No, your Honor.

THE COURT: All right. Let's do that. If there's anything else you want to respond to in this supplemental brief, you can do that at the same time. Right now we've got the original motion and the government's opposition, and then we've got the defendant's reply which was a package that the Court had at the last hearing. Now we've got a brief after hearing. So the government would have the right to respond to that brief without going back and just reiterating everything that's in your previous papers.

MS. SKIPPER: That's fine, your Honor. I had prepared my arguments in response to the brief filed after the hearing. I will be glad to put those in writing. I can have those on file to the Court by Monday.

THE COURT: All right. So we'll hear this on November 6th at 9:00 a.m.

MR. REICHEL: Thank you very much, your Honor.

THE COURT: All right.

MS. SKIPPER: What time will that hearing be, your [7] Honor?

THE COURT: 9:00 a.m.

MS. SKIPPER: Thank you.

(Proceedings were concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. Cr. S-02-164

UNITED STATES OF AMERICA, PLAINTIFF

v.

JEFFREY GRUBBS, DEFENDANT

REPORTER'S TRANSCRIPT

FURTHER HEARING RE MOTION TO SUPPRESS

WEDNESDAY, DECEMBER 11, 2002

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

Reported by: KELLY O'HALLORAN, CSR #6660

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[1]

SACRAMENTO, CALIFORNIA

WEDNESDAY, DECEMBER 11, 2002, 9:00 A.M.

THE CLERK: Calling criminal case 02-164; United States versus Jeffrey Grubbs. This is on for further evidentiary hearing, your Honor.

MS. SKIPPER: Good morning again, your Honor. Camil Skipper for the United States.

MR. REICHEL: Good morning, your Honor. Mark Reichel with the Federal Public Defender. My client, Mr. Grubbs, is present out of custody.

THE COURT: I think Mr. Grubbs can probably be seated. We're going to hear the rest of the arguments at this time. Ms. Skipper, have you had an opportunity to review the latest points and authorities filed by Mr. Reichel?

MS. SKIPPER: Yes, your Honor. I appreciate the opportunity to do so.

THE COURT: All right. So how do you wish to proceed today?

MS. SKIPPER: I'm prepared to argue, your Honor.

MR. REICHEL: I agree, your Honor. I'm prepared to argue. I think the pleadings establish everything that's before the Court. I'd like to be heard in argument.

THE COURT: All right. Let's break it down by the arguments so that we're not all talking about different things [2] at once.

Which issue or which part of the motion do you want to discuss first?

MS. SKIPPER: Perhaps we could move sequentially through the issues that were raised by Mr. Reichel in his pleadings.

THE COURT: He raises all the issues in his pleadings. I want to take them one at a time.

MS. SKIPPER: Right, exactly. Move sequentially through those separate arguments.

THE COURT: Which one do you want to take first?

MS. SKIPPER: The first issue that was raised was whether or not the magistrate judge's finding that the videotape contained child pornography was clearly erroneous. And that has to do with whether or not the magistrate judge had a substantial basis for concluding that probable cause existed to believe that the videotape that was delivered to Mr. Grubbs' home contained child pornography.

As stated in the government's brief, and we believe that it does, in the affidavit that was supplied to the magistrate judge, Inspector Welsh clearly states that he viewed the videotape personally, he judged the age of the minor to be between 10 and 13, and that he observed certain sexual activity which is detailed in the brief as well as the affidavit. He identified himself as a child

sexual [3] exploitation specialist for the Northern California Division of the United States Postal Inspection Service. And he stated that he received training in identifying and approximating the ages of individuals depicted in the pornographic materials.

Now, in the Ruddell case which—

THE COURT: Well, and you also have the e-mails that went back and forth where they were describing this as child pornography.

MS. SKIPPER: That is correct.

THE COURT: Saying that if this person is over ten years old, that he'd be surprised.

MS. SKIPPER: That's correct, your Honor. We believe that all that points to the fact that the magistrate judge had probable cause to believe that that videotape that the agent was going to be providing to Mr. Grubbs had child pornography on it. And a similar affidavit in the Ruddell case was found to be sufficient. The postal inspector in that case made similar representations about her experience, the fact that she had viewed the videotape, and she was explicit—not as explicit as Mr. Welsh was, but explicit in identifying what appeared on the tape. We believe that establishes probable cause.

THE COURT: What's the next issue?

MS. SKIPPER: Well, a related issue is whether—having to do with morphed images, and we also believe that [4] Inspector Welsh was

competent for purposes of establishing probable cause that those images were not morphed.

MR. REICHEL: I would submit that argument, your Honor.

MS. SKIPPER: Okay.

THE COURT: All right.

MS. SKIPPER: The next issue is whether there was probable cause to have seized items other than the videotapes that were identified in the search warrant. And the government has already stated that the government will not be offering that proof at trial, but that they will ask that it be considered relevant conduct at the time of sentencing.

We did make a substantive argument as well in our brief. However, because we have not charged possession, we do not believe we need to go any further into that.

THE COURT: Let's stop there. Do you have an argument on that?

MR. REICHEL: Yes, your Honor. It makes it a defective warrant, I believe.

THE COURT: Well, I read your brief, and I went and looked at the Weber case because that's the one you cited the most and relied upon the most for this argument. In Weber, at the very end of the opinion, Judge Fletcher says, "The district court should have suppressed the evidence seized pursuant to paragraph 2 of the warrant." Then it says [5] "reversed." But paragraph 2 of the warrant, if

you look at page 1340 of the opinion, is the paragraph that talks about books, magazines, pamphlets, et cetera, et cetera. And paragraph 1 was the paragraph that referred to the four sets of photographs that were the ones that would arrive in the controlled delivery. So what the court said there was the only thing that the district court should have suppressed was the other things. And the court does not say that the district court should have suppressed the items that were the subject of the controlled delivery. So if the government in this case doesn't want to offer the evidence other than what was the subject of the controlled delivery, there's nothing to suppress even if I agree with you.

MR. REICHEL: I think under Judge Fletcher's opinion, it seems to me that the last paragraph suggests that you can sever out portions that are overbroad.

THE COURT: That's what it suggests.

MR. REICHEL: Portions that don't have probable cause to support a search for those objects.

THE COURT: It doesn't suggest that. It holds that.

So do you have anything else to say on that?

MR. REICHEL: That may be the death knell to that argument, your Honor.

THE COURT: All right. What's your next argument, [6] Ms. Skipper?

MS. SKIPPER: The next issue we can address at this point is an issue that is raised in defendant's last filing, whether or not the government obtained valid consent to search the defendant's computer and digital storage material.

THE COURT: But you're not going to offer that.

MS. SKIPPER: We were not going to offer that.

THE COURT: Okay. So that's the same reason. That's moot.

MS. SKIPPER: Yes.

THE COURT: Okay.

MS. SKIPPER: The next argument is whether the search warrant is a deficient forthwith warrant because it does not require commission of a crime before execution of the warrant is triggered. And here there are really two issues that come up. Number one, the anticipatory nature of the warrant. And, second, the triggering, the fact the triggering event was not on the face, and whether that oversight is fatal to the warrant.

Here, the Hotal case is the seminal case on this issue. It's the government's argument that, number one, Hotal does not say that the triggering event need be on the face of the warrant. It certainly should be, and the government concedes that it was an oversight that it was not. But Hotal says it doesn't have to be. There is a way to cure that [7] error.

And what Hotal says is that the necessary conditions for the triggering of the warrant must be an attachment, and those attachments must be in the possession of the executing officers at the site to guide them in their actions and so that they can provide information for the person whose residence is being searched.

And in this instance, although the triggering event was not on the face of the warrant, the triggering event was recited twice in the affidavit. And contrary to what the defendant says, there is evidence that the affidavit was at the site. The defendant says that there was overwhelming evidence that it was not at the site. And he bases that on the fact that the affidavit was not presented to Mr. Grubbs or to his wife, and that it was not mentioned in the report that the affidavit was at the site.

Actually, Inspector Welsh testified on the stand that the affidavit was at the site. That is in his grand jury testimony. It's at page 52, lines 8 through 10. And the members of the search team were aware of the content of the affidavit because Inspector Welsh testified that the members of the search team were required to read the affidavit the night before they executed the search. And that's at Inspector Welsh's testimony, page 52, lines 11 through 21.

THE COURT: Do you think that satisfies the Hotal [8] requirement even though it may not have been present? I know you're arguing that it was present, but suppose for purposes of argument that the affidavit wasn't present, but the unequivocal testimony was that the agents had read it before

they went out to the scene and were aware of the triggering event.

MS. SKIPPER: Under Hotal, it doesn't seem so.

THE COURT: Doesn't seem what?

MS. SKIPPER: It doesn't seem that that would satisfy. There are other cases in the Ninth Circuit where it would seem to militate the other direction, but Hotal plainly states that there was no evidence in the record that the affidavit had been at the site of the search. And for that reason, Judge Reinhardt found that it wasn't valid.

But in this instance, there's no contrary evidence to say that it wasn't. All we have is evidence that it was.

THE COURT: Well, there's an argument that it wasn't. There's an inference they want the Court to draw that it wasn't. But I don't think there's any dispute if it was sufficient to say that the officers knew the triggering event. I don't think there's any dispute that they knew it.

MS. SKIPPER: They did know it. And the inference that the defendant's asking to draw is an improper one. First, the fact that it was not listed in a report means nothing. That is not the sort of information that would end [9] up in an investigator's report, that yes, he had a copy of the affidavit at the site. I wouldn't expect it to be there, and the fact that it's not there means nothing. And the fact that it wasn't presented to Mr. Grubbs or to

his wife, again, means nothing. Because as I will argue next, I believe, that the affidavit need not have been presented to them anyway. So just because the affidavit wasn't presented doesn't mean anything.

But we do have the testimony of Inspector Welsh that the affidavit was indeed at the site.

MR. REICHEL: Before we leave—

MS. SKIPPER: That's the only evidence on that point.

THE COURT: Okay. Mr. Reichel, do you want to respond to this?

MR. REICHEL: Yeah. I'd like to stop there and talk for a minute about Hotal. Specifically what happened here, and under Hotal, the law of Hotal, makes this a defective warrant again. And I'll tell you why.

The government correctly cites the dual purposes, that in an anticipatory search warrant case, the affidavit should be, and I'm going to use the term be married, to the search warrant, and it should be present on the site. There's two reasons. One, to guide the officer's discretion, which the government identifies. And the second reason is so that the citizen whose home is being searched has the opportunity to [10] view it, review it, and understand whether or not the police are exercising lawful authority, whether they're exceeding their bounds, whether they should even be there.

And in this case there's no dispute that Mr. Grubbs—well, there's no dispute, in my opinion, that this is what actually happened. And if you look under the contours and the parameters of Hotal, that in an anticipatory warrant case where the warrant face doesn't have the triggering event, but the triggering event is in the affidavit, that under Hotal what happens as follows, as I'll explain to the Court, makes it defective.

First of all, Inspector Esteban testifies that as soon as they got to Mr. Grubbs, he made several comments about what's going on, what's happening here. Inspector Esteban testified next that it was approximately 30 minutes later at a table that the search warrant was supposedly given to—set on the table in front of Mr. Grubbs folded in three so that you could only see the search warrant itself.

There's no dispute from Mr. Esteban as well that Ms. Grubbs or Ms. Bradstreet, his wife, the occupant of the house, was present, was in another room, is asking what's going on, what's going on here, I need to know what's going on. And then Ms. Bradstreet testified, and it's uncontradicted, that immediately she asked what was going on when they had arrived at the residence. This is in the [11] transcript of the testimony. That she went for seven to ten minutes and returned, immediately asked what's going on, continued to ask what was going on. They told her, and this is her testimony in the transcript, repeatedly they couldn't talk about it, they'll tell her later, things like that. And at the very end of the search, she was given a search warrant.

THE COURT: But none of this testimony established that they gave either her or him the affidavit.

MR. REICHEL: Correct, your Honor. And, in fact, the government has conceded here in this court that the affidavit was not given to Mr. Grubbs, and the affidavit was not given to Mrs. Bradstreet.

THE COURT: So the legal issue is squarely drawn here as between the two arguments that each of you respectively are making.

Ms. Skipper, you're arguing that as long as the affidavit is there and the officers know of its limitation of the contingency in the affidavit, that is sufficient.

Mr. Reichel is saying it is not sufficient unless the affidavit is also given to the defendant because there are two purposes for requiring the triggering event to either be in the warrant or the affidavit. One of them is the one that you acknowledge. The officers have to know. But the other one Mr. Reichel says is so the defendant or the person at the place knows why the officers are there and can make a [12] determination by looking at either the face of the warrant or whatever is attached to it that they're in the right place at the right time.

MS. SKIPPER: In fact, what the Hotal decision says is that the second reason is so that the officers can provide information to the person whose property is being searched. What Hotal doesn't say is that you give them a copy of the affidavit in the

instance where the triggering event is not on the face, but it is to be present at the site so that you can give information to the individuals whose property is being searched.

THE COURT: So you can give what information though?

MS. SKIPPER: Answer their questions that they may have about why it's taking place, the triggering event, but it doesn't say that you must give them a copy of the affidavit. There are circumstances—

THE COURT: But does the law say that you have to give them a copy of the warrant?

MS. SKIPPER: Yes.

THE COURT: And isn't the reason that you have to give them a copy of the warrant so that they may see that officers are in the right place at the right time doing the right thing?

MS. SKIPPER: Yes.

THE COURT: Okay. If you concede that, then the [13] person at the home has to rely upon some sort of an oral statement from the officer about the condition precedent or they wouldn't know it; right?

MS. SKIPPER: Yes. If they ask a question, and the officer has the affidavit present at the site. Right.

THE COURT: But if you acknowledge the first question, and maybe you acknowledge more than

you intended to, but if you acknowledge that the purpose of the requirement that you give the person a copy of the affidavit is so the person can look at the—I mean strike the affidavit. Strike what I said.

If you acknowledge that the purpose of the requirement that the officer give the person a copy of the warrant is so the person can look at the warrant and thereby determine that the officers are in the right place at the right time doing the right thing, then they can't make that determination where the condition precedent is not on the warrant unless they also have the affidavit with it. See, that's the argument.

MR. REICHEL: Your Honor, I think the McGrew opinion—

THE COURT: Let me hear your answer on that.

MS. SKIPPER: Before I address the McGrew opinion, which the government argues is not helpful on this matter, the search warrant itself tells the individual that the officers have authority to search the residence, to search where, tells [14] that they have authority to search the residence. And the attachment, this is attachment B, tells the individual what the officers have authority to seize.

The triggering event is, in essence, the thing that gets the ball rolling in this instance. This warrant had the word "anticipatory" written in at the top, which the Court can plainly see, and which, as

I've already acknowledged, I wrote myself, because it was not already on there.

The triggering event information was something that certainly if they had asked that information could have been supplied, they could have been shown that portion of the affidavit.

THE COURT: But why do you need to ask? If that was the rule, then you wouldn't have to give them a copy of the warrant. You could just say well, if they ask, we can tell them what's in the warrant.

Let me give you an analogy and tell me what you think the law is here. There are daytime only search warrants; right?

MS. SKIPPER: Yes, your Honor.

THE COURT: Now, suppose you have a daytime only search warrant, but it wasn't on the face of the warrant. It was only in the affidavit. If the affidavit said I'm seeking permission to search only in the daytime, but it didn't appear on the face of the warrant, would that be valid if you didn't [15] present the affidavit to the party at the time you presented yourself to make the search?

MS. SKIPPER: I'm thinking about that, your Honor. If the search was conducted during the day and in all other ways it obeyed the terms of the authority by the magistrate judge?

THE COURT: Right.

MS. SKIPPER: I'm honestly not sure, your Honor.

THE COURT: It's a similar situation, because there the homeowner wouldn't be able to tell by looking at the face of the warrant that the officers were only entitled to be there during the day, but, in fact, they were only there during the day. So in one respect, you say no harm, no foul.

MS. SKIPPER: But I guess what's keeping me from expressing a firm opinion on that with regard to the hypothetical that you put forward is that I keep harkening back to the fact that we have a decision that applies specifically to anticipatory search warrants, which is what we have in this case.

THE COURT: Well, I know, but you have other case law that applies to daytime only search warrants, and I'm wondering if maybe you can get some insight from the law with respect to those search warrants.

MS. SKIPPER: Unfortunately, I haven't read any of those.

THE COURT: I just see the argument on both sides. [16] Obviously, there is a purpose for the requirement that the warrant has to be presented to the person at the residence. And obviously, it seems to me, the purpose of that is so the person can look at the warrant and know that the officers are rightfully there.

MS. SKIPPER: Yes.

THE COURT: For example, if they were at the wrong house, the person would be able to say, wait a minute, wait a minute, this is the address of the place next door. Or if it said that they could only be there during the day, wait a minute, wait a minute, this is night, you're in the wrong place. On the other hand, if it said it could only be done after a delivery was made, the person could say, wait a minute, wait a minute, the delivery hasn't been made.

So that's the reason for the requirement.

MS. SKIPPER: Well, your Honor, I'm just left with the Hotal case. And this is a 1998 case. The need to present warrants to individuals is well known at that time, yet in the Hotal case, Judge Reinhardt does not require that the affidavit be given to the homeowner.

THE COURT: But he doesn't say that it does not have to be given. He's just silent, isn't he?

MS. SKIPPER: In fact, what he says is there needs to be evidence that the affidavit was at the site of the search to guide the officers or to provide information to homeowners.

[17]

THE COURT: I know. But the reason he reversed it is because there was no evidence that it was there. So he doesn't get to the question of whether it has to be presented to the person or not. He reverses because it's just not ever there. He

doesn't deal with the question of if it is there, whether it has to be presented to the homeowner.

MS. SKIPPER: The government would argue at this point that if it did have to be presented, we would expect to see that in the decision.

THE COURT: No, I don't think so. It would be dicta at that point because it wasn't even there at all, so it obviously couldn't be presented.

Maybe I better see if there's anything in the language of Hotal that supports you. There's nothing in the holding that supports you. Maybe the language will.

MS. SKIPPER: Well, in that regard, I would simply point the Court to the Ruddell case which is cited with approval in Hotal. And in—I'm sorry. Well, it's discussed at some length in the government's opposition brief, so I would refer the Court to that.

THE COURT: All right.

MS. SKIPPER: The specific discussion of the connection between Hotal and Ruddell and Hotal's adoption of Ruddell.

There is another issue with regard to the search.

[18]

MR. REICHEL: Before we leave the Hotal argument, as we call it, may I be briefly heard?

THE COURT: Yes.

MR. REICHEL: Thank you. I think that anticipatory warrants are different. And I think any reviewing court that would see this would agree with me that under the Fourth Amendment, it says no warrant shall issue but upon probable cause. And I think that's the important thing, that there now exists probable cause. And in this warrant, it was a forthwith warrant, and it said shall search now, and I believe there's evidence of a crime, and you shall search forthwith. But at the top, it said "anticipatory." And so I think that's kind of confusing at that point.

And I think in anticipatory warrant cases, the triggering event, if it is not on the face of the warrant and if it is instead on the affidavit and, in fact, as in this case, the face of the warrant says "forthwith search," I think there can be no stronger case for the requirement that be given to somebody at the very outset of a search for the reasons the court identified, and as well no oral pronouncements by the officers who are executing it as to the triggering event to why they're there.

THE COURT: Well, it may well follow from Hotal, but it's taking it one step further than the court either did or had to take it in Hotal.

[19]

MR. REICHEL: I agree.

THE COURT: Okay.

MS. SKIPPER: I would simply mention, your Honor, dealing with the issue of the face of the war-

rant saying "anticipatory" and then the "forthwith" language appearing below, that is exactly the situation in the Ruddell case, and the Ninth Circuit found that that was still an anticipatory search warrant.

MR. REICHEL: And, your Honor, my view of the facts are that whatever happened the day of the search is one thing, but I filed an opening brief that said the search warrant affidavit wasn't present, it wasn't provided to the Grubbses, and it wasn't given to them at the outset. The agents then reviewed that motion, filed a declaration. The declaration said we left the search warrant at the site. And that was the extent of the declaration. So then, your Honor, I filed a reply motion which the officers again reviewed, they appeared and testified, and at no time did they ever say that they gave the affidavit at the outset of the search, leave it behind, or present it to Mr. Grubbs.

And I think the real inference in the facts is that nothing was shown, and, in fact, at the very end of the search, only the search warrant face was given to Ms. Bradstreet.

THE COURT: All right. Well, we're still talking [20] about this question of the forthwith and the triggering event.

MR. REICHEL: But that actually is relevant for the Hotal argument, whether it was married, as I call it, married to the warrant. And I think the real inference is that it was never mentioned in any report that an affidavit was there, or that an affidavit accompanied the warrant. It was never

mentioned anywhere until when it became painfully obvious that the omission of such had strong legal significance.

THE COURT: All right. Are there any other issues now that you want to address?

MS. SKIPPER: I believe that Mr. Reichel misspoke. Because he did not previously argue that the affidavit—well, I'm sorry. Just a moment, please. Well, actually I dealt with that in my brief. I won't get into that right now.

But there is another issue. And that is whether this search warrant allowed execution of it before the videotape had entered the residence. And that goes to whether or not this is a forthwith or an anticipatory search warrant.

THE COURT: But it wasn't executed before.

MS. SKIPPER: It was not.

MR. REICHEL: I'm sorry?

THE COURT: This is the same issue really.

MS. SKIPPER: The next issue is whether or not there was a Rule 41(d) violation in either the inspectors not having provided a copy of the search warrant to the defendant or the [21] timing of their providing the search warrant to the defendant. Certainly Gantt requires that the search warrant be provided at the beginning of the search. And in this instance, the testimony was that it was provided about 30 minutes after the first contact with Mr. Grubbs. Inspector Welsh testified that during that

30 minutes, many things were taking place. They were getting the children off to school so that Mr. Grubbs' wife could take them. They also were securing the residence. They were taking photos. They were sketching the house. And they also were required to secure some narcotics paraphernalia that was found during the first walk-through of the residence.

As soon as they were able to sit down at the table to talk with Mr. Grubbs, the testimony is that Inspector Welsh provided a copy of the affidavit—or of the search warrant to Mr. Grubbs, and there is no contrary testimony in the record. And Mr. Grubbs has not supplied a declaration or any testimony—

THE COURT: And there was no search before they provided it; is that right?

MR. REICHEL: Not in my opinion, your Honor. I think the evidence is clearly, clearly to the contrary. They seized the residence immediately, your Honor. They went into the residence, and they photographed it. They went into the residence, and they did a protective sweep. They went into the residence, and they drew diagrams of the residence. They [22] went into the residence, and they were searching the residence immediately, your Honor.

MS. SKIPPER: All of those things take place prior to an actual search.

THE COURT: Well, I'll have to go back and look at my notes here now. This hearing took place

about a month ago. I've done a few things since then.

MS. SKIPPER: Inspector Welsh's testimony on page 47 may be helpful in this regard.

THE COURT: You had this testimony typed up, didn't you?

MS. SKIPPER: Yes. I do have a transcript.

THE COURT: So let's take a look at it.

MS. SKIPPER: I'm handing it to your clerk.

THE COURT: No, I have it. What page is it on? Somebody attached it. Didn't you attach it?

MS. SKIPPER: I had forgotten that I attached that.

THE COURT: What page?

MS. SKIPPER: 47, 48, your Honor, of the testimony.

THE COURT: All right. Where was the testimony, Mr. Reichel, that you thought established that they were searching the house?

MR. REICHEL: I haven't looked at Inspector Welsh. I begin on page 23, which is Inspector Esteban, who says exactly that. Page 23, your Honor, of the transcript.

[23]

THE COURT: I guess we need to establish whether the protective sweep is part of the search, because protective sweep, by definition, is something that has to be done quickly, and you don't sit down with a person and show them a warrant and then do a protective sweep. If you do, you're dead before you have a chance to go through this.

MR. REICHEL: I agree, your Honor. I have to tell you, I think given the opportunity, I really don't think that this can be much of a factual issue in dispute. There are nine officers there. And as soon as they got there, the police reports say they entered the house to photograph it and to sketch it. And I'll go through the transcripts, but I think that this really—the record truly does not belie that there was not an entry, there was not a seizure, and there was not a search of that premises immediately.

I think the facts support the defendant's position. I will go through the police reports, I will go through Inspector Grubbs' testimony—I'm sorry, Mr. Welsh. I really don't think that seriously should be disputed. There's several officers in that residence immediately, and I really don't think that's subject to reasonable dispute. They didn't stay outside. I mean it's in their reports that they immediately photographed and sketched the residence and did a protective sweep. And one of the first things I did was ask Inspector Esteban that. He acknowledged that.

[24]

And I'll look in Inspector Welsh's, but—

THE COURT: Well, that's the issue, isn't it, under Gantt?

MR. REICHEL: Yes

THE COURT: As I recall, I was not aware of this requirement when we were at the last hearing. I didn't know that the warrant had to be presented before they did the search. And I asked Ms. Skipper, I said, well, isn't that enough if they presented the warrant to the woman before they left? Doesn't that answer the question? And she said no. We acknowledge that the warrant has to be presented before the search.

MS. SKIPPER: At the commencement of the search, your Honor.

THE COURT: So the dispositive issue here is whether they were doing the search before they presented the warrant; is that right?

MR. REICHEL: Yes.

THE COURT: Is that right, Ms. Skipper?

MS. SKIPPER: Yes, your Honor.

And we contend that the activities that took place are things that are normally done in anticipation of the execution, of the search. Because they have to secure the residence, they perform a protective sweep, there were other things that they needed to do during that protective sweep. And also in [25] Mr. Grubbs' pocket, they found drug paraphernalia they had to secure and dispose of.

There was also the issue of the wife and the children at the home.

And before they conduct the search, they must ensure that they secure the residence in its original state. And they do that also by taking pictures to ensure before they search anything and before they take anything apart and before they look for anything, and that's considered part of the securing of the residence.

THE COURT: If you take a picture of everything, isn't that doing a search? I can understand a protective sweep, because it's silly. Nobody but an appellate court would suggest that you have to sit down with them and go over the warrant before you do the protective sweep, because the whole purpose of the protective sweep is to protect you. So I can understand why you have to do the protective sweep before you give them the copy of the warrant. But if they're going through taking all these pictures, why can't they show him the warrant before they go through and take all these pictures?

MS. SKIPPER: Well, you could do that at the same time as well. But what we argue in this case is that—and when they were taking the pictures, they're not taking pictures of things they intend to seize. They're not taking pictures of specific items that they believe match up with items that they're allowed to seize under the warrant. At that point [26] they were just taking pictures of the residence as a whole.

THE COURT: Why do you have to do that before you show him the warrant?

MS. SKIPPER: I don't think it's necessary that you have to do it before you show them the warrant, but I don't believe that doing so before the inspector sat down with Mr. Grubbs and showed him a copy of the warrant is a violation of Rule 41(d).

THE COURT: Show me what you're talking being about here, Mr. Reichel.

MR. REICHEL: Thank you very much, your Honor. I think the facts really can't be subject to much dispute. Begin, as I said, with Inspector Esteban has said they went in right away. But if you look at page 47 of Inspector Welsh's testimony—

THE COURT: That's what I was looking at just a minute ago.

MR. REICHEL: Your Honor, I believe strongly it is a search, and it is a seizure of a residence when, to wit, they go in, they talk to the wife, explain why they're there, make sure the kids go off to school, check their backpacks, which is a search, your Honor, anyway. "Photographs were taken of the house, sketches, hand-drawn sketches of the house had to be made. It took a while to clear things away from the table. We had to deal with narcotics paraphernalia" and so forth. [27] "So all told, I think all those preliminaries took about 30 minutes."

Also, your Honor, if you move to—

THE COURT: Look, if you take these one at a time, the only thing that really concerns me is taking the photographs, because you've got kids that are about to leave the house. Now, if you let them leave the house before you do the search and they've got backpacks, then they could be walking out with something that you're looking for.

MR. REICHEL: Your Honor, I believe that's probably lawful, and I'm not going to argue that point.

THE COURT: Okay. So you agree with me that what really is of concern here is taking photographs inside the house.

MR. REICHEL: No, your Honor. I think there are exceptions to search warrant requirement. But looking in a backpack, whether that's lawful or not, your Honor, is still a search, it's still a seizure. And I just can't imagine that the state of the case law under the Fourth Amendment is officers can be present in the house for 30 minutes and do all those things and that not be a search.

THE COURT: How about this. You walk into the house to do the search, and there's a dozen people in there. And so you start to do the search, and immediately a dozen people start walking out with bags. Now, you've got two choices. [28] You either do what the circuit courts would like you to do, which is let all those people leave with the bags and then do your search, which is sort of like going over to Iraq and doing one of those searches over there and not looking in the bags, or you look in the bags, but you don't have the time to sit down and go

over the search warrant with the people before you look in the bags because the people are on their way out.

MR. REICHEL: You have to go over the search warrant with them, your Honor. These are different cases, but there are a lot of cases that talk about detaining people on a couch. They can't leave if they're leaving with bags when you're going to execute a search.

But I submit to the Court that I believe it's very clear—I don't have case law on it, but when they're inside there and there are six officers inside, and in this case there's children and Ms. Grubbs outside, they approach them outside the residence.

THE COURT: I suppose you're right. The thing the circuits probably want you to do is the more unreasonable thing. But I think you're right. What the circuits want you to do is detain the kids rather than let them go. What makes sense is to let the kids go. But what the circuits probably want you to do is to detain the kids, because you can't do a search until you go over the warrant with the person. And looking in the bag in order to let the kids go is a search, [29] isn't it, Ms. Skipper?

MS. SKIPPER: Well, your Honor, they did so, as Inspector Welsh said, for safety reasons. But yes, they did check their backpacks for the purpose of allowing the children to get to school.

THE COURT: But that's not safety reasons. That's to make sure that the evidence isn't being taken out of the premises.

MS. SKIPPER: I was just describing Inspector Welsh's testimony.

THE COURT: Yeah, but that's not safety.

MS. SKIPPER: The fact is what they were trying to do was to allow the children to get to school on time. We believe that that was a reasonable thing to do under the circumstances.

THE COURT: But they didn't say they did it for safety reasons. It says, "As per safety procedures and to make sure nothing was leaving the house."

MS. SKIPPER: Yes. That was Inspector Welsh's testimony.

THE COURT: And that's the real reason they looked in the backpacks. Not for safety reasons. The kids were leaving the house. They wanted to make sure they weren't taking the very evidence that they were looking for out of the house. And they did the reasonable thing, which is to not detain [30] these kids, to let them go to school. But the reasonable thing isn't always the lawful thing. Because the lawful thing is that you can't do a search until after you go over the warrant with the resident; right?

MS. SKIPPER: Well, until you present the warrant. The presentation of the warrant is supposed to be at the commencement of the search.

THE COURT: So how do you get around the fact that they searched people's bags before they presented the warrant?

MS. SKIPPER: There's nothing in the record to describe exactly how the search of the children's bags took place and whether or not that was done with the consent of the wife so that the children could leave.

THE COURT: Well, if you're going to show consent, you've got to have evidence.

MS. SKIPPER: Exactly. The alternative would have obviously been to detain the children there so that they could not leave and go to school. And it's reasonable to surmise that under those circumstances, any parent, particularly a parent who is about to have their house searched, would want the children away from the residence and would submit this to us.

THE COURT: Yeah, but that might not be a voluntary consent then. It's reasonable to say that they consent because they wanted their kids out of there. But we don't [31] have any evidence that there's even an involuntary. We don't have any evidence that there's any consent.

MS. SKIPPER: There is no evidence with regard to that issue in this record.

THE COURT: So how do you get around it?

MS. SKIPPER: I've made the arguments I think I can make, your Honor. The only other thing I think I can say is that at least with regard to Inspector Welsh's understanding of what was occurring there, he called these preliminaries to the search. And I would just submit that the Court can

consider—in the government's view, these are preliminaries to the search as opposed to the actual beginning of the search.

THE COURT: You take the same kind of reasoning as in Weber, though, here, Mr. Reichel. And that is that, okay, if they found anything in the bags, it would be suppressed.

MR. REICHEL: I'm sorry, your Honor. I don't understand the Court's question.

THE COURT: I hadn't finished yet.

MR. REICHEL: I'm sorry.

THE COURT: In Weber, the court only ordered the suppression of the evidence that was—

MR. REICHEL: Well, there was no probable cause for that evidence.

THE COURT: No probable cause. So you can sever—

[32]

MR. REICHEL: A warrant.

THE COURT: —certain things. And I don't know what the law is. I guarantee you it depends on which panel you get on the court. But I bet you find cases that say when they come in and they start to search, and something isn't done, whatever they acquire before the right thing is done is suppressed. But after they do that, then anything they acquire afterwards, unless it's fruit of the

poisonous tree, is admissible. I bet you I find cases that say that.

MS. SKIPPER: No, your Hono[illegible]. That actually isn't the law.

THE COURT: Okay. Then you lose that argument.

MS. SKIPPER: The Ninth Circuit actually has held that if there is a Rule 41(d) violation, it does not require suppression unless there is a deliberate disregard of the rule on the agent's part or the defendant was prejudiced by the violation. And I would submit that—

THE COURT: Or the defendant was prejudiced.

MS. SKIPPER: Or the defendant was prejudiced.

THE COURT: Okay. Then that's the ruling then. See, if the defendant—that's another way of saying what I was trying to get to. If the defendant isn't prejudiced by—how is the defendant prejudiced by the fact that the backpacks were searched?

MR. REICHEL: I don't think that he's claiming a [33] prejudice from the backpacks.

THE COURT: What's the case say? Give me that again. Rule 41 violation.

MS. SKIPPER: A violation of this rule, Rule 41(d), does not require suppression unless there was

a "deliberate disregard of the rule," or the defendant was prejudiced by the violation. And that is from the Gantt case.

MR. REICHEL: Thank you, your Honor.

Okay. I believe it's the government's burden, your Honor, to prove that one of those exceptions applies. And in this case I strongly believe at the outset of the search, they walk up to Mr. Grubbs, they say Mr. Grubbs—they don't say something like you know why we're here, don't you, and now Mirandize him. To me, it seems simple. Mr. Grubbs, we have a search warrant to search your residence. This is it, sir. We'd ask you to comply or to remain compliant, and you can review the warrant, sir. We're going to commence the warrant now. And then to enter the residence in light of the fact they absolutely know that there is a mother, two children, and Mr. Grubbs who reside there. The triggering event has just occurred, they've delivered it, he's walked out of the residence, and she's walked out of the residence with the two children, your Honor.

And instead they don't give him at the outset and say, Mr. Grubbs, this is the warrant to search your premises, and [34] it's got all of the attachments, it's a complete warrant. Instead, they have flagrant disregard for the rule.

THE COURT: Why would they deliberately disregard the rule? What advantage do they get from it?

MR. REICHEL: Your Honor, I know this. In the Gantt opinion, interestingly enough, I believe it's from Gantt, is they ask about the warrant. I believe it's Gantt—it may be another case. And I'll look at them—where they asked about the warrant. Because they asked, officers didn't provide, I believe that there's opinions that say if you ask, the officers don't provide, that's a flagrant disregard.

In this case, I think it's absolutely the same. Mr. Grubbs is not provided it. He's not provided it for 30 minutes. In that 30 minutes, Ms. Grubbs is saying what's going on, they're searching. I strongly believe the evidence is clear they're seizing and searching the residence at that point, and they're not given the warrant until 30 minutes later.

It's a flagrant disregard. And so the Court can either find flagrant disregard or prejudice to Mr. Grubbs.

THE COURT: What's the prejudice?

MR. REICHEL: "Or," your Honor.

THE COURT: Okay. So you don't have any argument that he was prejudiced by it.

MR. REICHEL: Other than he made—well, yes, your [35] Honor. You are prejudiced. I mean he allegedly consented 30 minutes later to a search. He allegedly made statements which were not—

THE COURT: There's no issue of consent here. They're not offering anything that they need to rely on consent.

MR. REICHEL: He made statements, your Honor. He made non-Mirandized statements.

THE COURT: That's what we're going to get to later this afternoon, I guess. There's so many issues in this. That's why I said to go through them one at a time. I'm going to take this thing under submission and probably give you about a 60-page memo on it, because there's no way I can refer all the issues to rule from the bench. We haven't even got to the Miranda yet.

MR. REICHEL: Under Gantt, the government bears the burden, I believe, your Honor. And all I have to do to defeat their meeting of their burden is to satisfy one or to prevent her from satisfying one of two alternatives. And the one I say, the disregard here, is flagrant, your Honor. There's nine people there.

THE COURT: They didn't say flagrant. What was the word?

MS. SKIPPER: Deliberate disregard.

THE COURT: Deliberate disregard means not that you did something intentionally, but that you did it in order to [36] disregard the rule. In other words, not that you just did it intentionally, but that you actually knew about the rule and deliberately disregard it. Right?

MR. REICHEL: Correct.

THE COURT: Okay. So why would they deliberately disregard the rule? What possible benefit

would they think they get from not just giving them the warrant?

MR. REICHEL: I can't examine their mind, your Honor, to ask why. Perhaps they thought there was a benefit in the search to them to obtain statements from an individual, to have an advance heads up on the search. There could be a variety of reasons. I know that their actions and their conduct can also speak as to their thoughts.

And I think deliberate also has a dual definition, your Honor. Not just what advantage they intended to gain, but their conduct and if it was deliberate. I believe he testified—this may be in the transcript—that he knows he's supposed to give it at the outset.

I think what's relevant to this Court is what they are trained on, what's relevant to this Court is what do the inspector's manuals state, and I also believe that this is right on with Gantt. I believe it is Gantt. The facts here, to me, are the same as in Gantt. Gantt was asking for the warrant. I believe it wasn't shown to them at the beginning. As a result, it wasn't prejudice that was held. It was the [37] deliberate indifference to the rule.

And in this case, Ms. Grubbs and Mr. Grubbs asking what's going on, what's going on, is the same.

MS. SKIPPER: Your Honor, with regard to whether they were deliberately indifferent to the rule or deliberately disregarded the rule, I think really with regard to the backpack, I do not believe

that they can show deliberate disregard to the rule because they were trying to act reasonably with regard to getting the children to school.

THE COURT: Whether they were acting reasonably or not is not the question. It's whether they disregarded the rule. The rule may be unreasonable, but the question is did they deliberately disregard the rule.

MS. SKIPPER: I don't believe they deliberately disregarded the rule. I think at that point the inspectors believed that they were simply smoothing this over so that this could occur, but they did not consider the search of the backpacks at that point to be a deliberate disregard of the rule. They were not trying to get around the rule so that they could look at the backpacks. They simply wanted to allow the children to get to school on time.

With regard to the search of the residence, any delay to get statements from Mr. Grubbs is belied by the evidence, because the only statement that they got at that point was when Inspector Welsh walked up to Mr. Grubbs. It was a [38] previous statement. They did not continue to question him. There are no more statements until they actually sit down in the residence and Mr. Grubbs is given his Miranda rights.

THE COURT: All right. How many more issues do you think we have?

MS. SKIPPER: I think one and a half.

THE COURT: Okay. Let's go to the next issue.

MS. SKIPPER: Okay. This is a corollary of whether or not the affidavit had to be presented to Mr. Grubbs. The defendant has cited the McGrew, Van Damme, and Ramirez cases. And I would simply distinguish those on this ground. Those cases deal with the need to meet the particularity requirement of the Fourth Amendment, and that is not at issue in this case.

Attachment B to the search warrant meets the particularity requirement. And because the warrant itself met the particularity requirement, you need not have presented the affidavit to do so. Those cases are where the—

THE COURT: Maybe I better hear from Mr. Reichel on that, because I don't understand the argument.

What's the argument?

MR. REICHEL: Thank you, your Honor.

In anticipatory search warrant cases, you can't satisfy Rule 41 and you can't satisfy the Fourth Amendment if you don't leave the affidavit as well, which contains the [39] triggering event. In an anticipatory search warrant case, if the search warrant itself does not have the triggering event on the face of it or in the attachments on where to search—

THE COURT: I thought that was the same issue we were talking about.

MR. REICHEL: The affidavit must be given to the citizen.

MS. SKIPPER: Well, the way Mr. Reichel is presenting it now, it is the same issue. That's not the way it was presented in the brief. Because the McGrew, Van Damme, and Ramirez cases don't deal with triggering event. They deal specifically with the particularity of a warrant under the Fourth Amendment. And so I'm just saying that those cases really are inapposite here.

THE COURT: Well, if it doesn't bother you too much, in my written order I'm not going to address this because I don't understand it.

MR. REICHEL: I'm sorry, your Honor. Maybe I need to make it clearer. It's set forth in my last pleading which was filed ten days ago.

THE COURT: That's the one I spent about three hours reading. So if I don't understand it yet, I'm just not going to understand it.

MS. SKIPPER: Well, maybe I can help, your Honor. I think I understand the defendant's argument with regard to [40] this. What he's saying —and he can correct me if I'm wrong—looking at the McGrew, Van Damme, and Ramirez cases, in those cases, for whatever reason, either because an attachment was not made or there was no attachment listing what items were to be seized, the affidavit was the only source of information to determine what was to be seized at the execution of the search warrant.

In the McGrew case, the affidavit was the only document that contained the list. They did not have an attachment. In Van Damme, they forgot to put attachment one with the search warrant. And so there was no list of the items that were to be seized, and there was no evidence that the application or the affidavit was at the site of the search. So, again, there was nothing there that said what items could be seized.

THE COURT: I just don't understand this as being any different than the argument we spent the first part of this hearing discussing.

MR. REICHEL: The argument is, your Honor, that you cannot leave behind a search warrant, and that's it, without the affidavit if it is an anticipatory search warrant that has the triggering event only in the affidavit.

THE COURT: Weren't we discussing that earlier today?

MS. SKIPPER: Yes, we were. And that was not the way it was raised in the defense briefs, so I was addressing it in [41] a different context. But if that's the sum total of the argument, then there is nothing else to say about that.

THE COURT: That's what I understand. I thought that was the same thing we were discussing earlier.

MS. SKIPPER: Then that leaves us with whether the defendant's statements that were

made before the Miranda warnings were given should be suppressed.

THE COURT: All right. Let's hear that argument.

MS. SKIPPER: Okay. It's the government's argument that there was no custodial interrogation in this case. It is clear the defendant was seized outside of his home. The defendant claims that. The government does not refute that. He was seized. He was not free to leave. But under Ninth Circuit case law, that is not the end of the inquiry, because it is lawful to temporarily detain someone or seize someone without it turning into a custodial interrogation. And that's from the Woods case which is cited in the government's brief.

In this instance, what you have to look at is the nature of that detention, what occurred in it. And in this instance, several things are clear. This interrogation took place outside. No physical force was used. There is no evidence that any weapons—

THE COURT: What are the statements that you're going to use?

MS. SKIPPER: The only non-Mirandized statement that [42] we have is, I believe it's, "Yes, I know why you're here, or, "Yeah, it's in the garage. That's the only non-Mirandized statement we have.

THE COURT: Well, that isn't even interrogation. First of all, your argument is that it's not custody. I find right now that it's not interrogation.

MR. REICHEL: Your Honor, interrogation is defined as a statement likely to elicit an incriminating response. And nine agents are there searching the house, and they say, "You know why we're here, don't you?"

THE COURT: To do a search.

MR. REICHEL: "You know why were here, don't you?"

THE COURT: Not "don't you." There's nothing about "don't you." "You know why we're here."

MR. REICHEL: I believe—I'll look through it, but Inspector Esteban is a witness to it as well as Inspector Welsh, your Honor.

MS. SKIPPER: And their testimony on that is inconsistent.

MR. REICHEL: I even believe, your Honor, if they say "you know why we are here," it's likely to elicit an incriminating response.

THE COURT: I would think it would be likely to elicit a yes or no answer which would not be incriminating.

MR. REICHEL: Your Honor, if they just purchased drugs [43] from someone and they ran up to the person and said, "you know why we're here, we're police officers," it's likely to elicit an incriminating response.

THE COURT: Well, I would make the same finding there. If you can find me one single case,

even out of this circuit, that says that that's a Miranda interrogation when you run up to a guy that just made a drug deal and you say "you know why we're here," and somebody says on an appellate court that that was a violation of his Miranda rights, I'd like to see it.

MS. SKIPPER: Well, essentially it's the government's argument that there was no interrogation.

THE COURT: Okay. I've got enough on this. That's the only statement you're talking about on the Miranda?

MR. REICHEL: Yes, your Honor.

THE COURT: Okay. I've got enough information on that.

MS. SKIPPER: And defense counsel can correct me if I'm wrong, but I think that's it.

THE COURT: All right. Well, I'm going to have to deal with this in a written order. So unless you have anything else to present, I'll take it under submission.

MR. REICHEL: Just for the full text of what was said, your Honor, Inspector Esteban does say on page 20 that his statement was, "You know why we're here, don't you?"

THE COURT: Oh, "don't you" I didn't write that [44] down.

MS. SKIPPER: Inspector Welsh in his testimony when asked what he said—

THE COURT: Oh, that was your question. "You know why we're here, don't you?" When I was writing it down, I was writing down his answer when he said it. What page is that?

MS. SKIPPER: From Inspector Esteban's testimony?

THE COURT: Esteban. That's the first thing I wrote down, so it must have been early in the testimony.

MS. SKIPPER: I think it's page 20, your Honor.

THE COURT: Well, that does say "don't you" then. I thought he said it first before somebody asked him a leading question, so you may be right. They may have said, "You know why we're here, don't you?" And I just took a note that says, "You know why we're here?" So it could have been my error in taking the note down.

MS. SKIPPER: And I would refer the Court to Inspector Welsh's testimony in this regard that begins on page 45. And he says, "I walked up and introduced myself, and I paused and I made the statement, nodding, 'You know why we're here.'" And I asked, "Did you state that as a question?" His response, "No."

"QUESTION: Were you particularly aware of whether you stated that as a question or answer?

"ANSWER: Yes.

[45]

"QUESTION: Why?

"ANSWER: Because I didn't want to ask any questions prior to Miranda."

But even if the Court were to find this was interrogation, it certainly wasn't custodial.

MR. REICHEL: I obviously would disagree, your Honor. He wasn't free to leave in any significant manner whatsoever.

MS. SKIPPER: Whether you're free to leave, your Honor, is not the test. The question is whether that detention—and I can provide the language to the Court specifically. The question is whether it was: "A formal arrest or restraint of freedom of movement of a degree associated with formal arrest." And that's actually the Supreme Court.

The Ninth Circuit certainly has noted that "questioning during a lawful temporary detention or seizure of a person is a custodial interrogation is not the law of this circuit." And that comes from United States v. Woods which is cited in the government's last brief.

There are instances certainly where individuals have been grabbed, shoved to the ground. They were not considered to be in custody at that point.

THE COURT: All right. I'll take it under submission.

MS. SKIPPER: I believe that's all, your Honor.

THE COURT: Thank you. Anything else?

[46]

MR. REICHEL: We discussed a case of Ramirez last time I was here on the point of whether this was a defective warrant because the affidavit wasn't married to it. And I want the Court to have that authority.

MS. SKIPPER: Yes, the Ramirez case. That is a case in which the court found that the attachment listing the particular items to be seized was not incorporated into the warrant or attached to the warrant, making it therefore a general warrant, which is prohibited.

THE COURT: All right. Well, it is in your brief. I think Ramirez is in your brief.

MR. REICHEL: No. It wasn't in mine, your Honor. I found it that Monday, and we came to court on a Wednesday. I'll give you the citation.

I gave you the citation the last time we appeared.

THE COURT: You've got one, two, three, four different briefs. When you get to the Court of Appeals, they're only going to have one brief, so they're going to have an advantage over me, because every time I want to look up an argument, I've got to look through four different briefs to make sure that I'm not missing your authorities.

MR. REICHEL: I've got the Ramirez opinion, your Honor. The citation is 298 F.3d 1022.

THE COURT: And what does it stand for?

MR. REICHEL: My argument that follows McGrew and it [47] follows—specifically, it follows the McGrew opinion, that a search warrant affidavit has to be provided to the individual at the commencement of the search and left at the end of the search.

THE COURT: Okay. Then we are in a different argument. I understand now that you're making a different argument. Okay. Let me get that one down.

All right. Let me hear your argument on that then, because that's the thing I said is never done. So most, if not all of the cases that I've ever had before me would have been unlawful searches under Ramirez because they never leave the affidavit. Sometimes the affidavit's even sealed. I've even ordered that affidavits be sealed. So I guess I've made it impossible for the officer to comply with Ramirez.

MS. SKIPPER: No, your Honor.

MR. REICHEL: They deal with a sealed affidavit and discuss that in the McGrew opinion, your Honor.

THE COURT: So what's your answer to that, Ms. Skipper?

MS. SKIPPER: I just think you need to look at the facts of those cases. McGrew deals with an affidavit that contained only a description of the items to be seized. That list of things that are appropriate to seized that are—

THE COURT: If that's the argument, I understand it. Because as far as I'm concerned, it's still part of that same [48] argument we were discussing about three hours ago here during the beginning of this discussion, which is that where you've got a warrant that is contingent upon something happening, that you've got to either have that contingency in the warrant that you present to the individual or you've got to present the individual with whatever it is that contains that contingency. And that I understood we were talking about a long time ago. If that's the argument, I understand it.

But if the argument is that every time an officer executes a search warrant, that he has to provide the affidavit along with it or else it's defective, that's a different argument, and I'm going to have to address that.

MR. REICHEL: I agree, your Honor.

THE COURT: Is that your argument?

MR. REICHEL: I think the Court is correct. I'm going to ask the Court to—my issue I would like the Court to answer is not presented in this case. And I don't—well, I'm going to have to submit it, because I think that an affidavit should be served, whether or not it's an anticipatory search warrant case.

THE COURT: All right. So I'll address that.

MR. REICHEL: And the Ramirez opinion, your Honor, I think supports both arguments actually. It talks about defective warrants, your Honor. And it is from March 2002, and it's from the Ninth Circuit.

[49]

THE COURT: All right.

MR. REICHEL: And it's 298 F.3d 1022. It also interestingly cites, I believe this one cites to—I believe it cites to Illinois vs. Gates and talks about the purpose of providing a citizen the search warrant.

THE COURT: All right. Anything else?

MS. SKIPPER: No, your Honor.

THE COURT: It will be a while before I get this out. It's going to take a lot of work. So you'll just have to wait. And if the Ninth Circuit thinks I waited too long, they can reverse whatever I do.

MS. SKIPPER: Presently, we don't have any further dates set.

THE COURT: We don't. Do you want to set a date then?

MS. SKIPPER: Perhaps just a control date.

MR. REICHEL: January 8th?

THE COURT: All right. I'll set a status conference on January the 8th.

MR. REICHEL: I appreciate the Court's consideration of this motion, your Honor.

THE COURT: All right. Thank you.

MS. SKIPPER: Thank you, your Honor.

(Proceedings were concluded.)

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[50]

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

KELLY O'HALLORAN, CSR 6660

AO 245B-CAED (Rev. 9/01) Sheet 1—Judgment in a Criminal Case

United States District Court
Eastern District of California

Case Number: 2:02CR00164-01

UNITED STATES OF AMERICA

v.

JEFFERY HAYMEN GRUBBS

[Filed: May 29, 2003]

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Mark Reichel,
Asst. Federal Defender
Defendant's Attorney

THE DEFENDANT:

[✓] pleaded guilty to count(s): 1 of the Indictment.
[ ] pleaded nolo contendere to counts(s)__ which was accepted by the court.
[ ] was found guilty on count(s)__ after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Numbers(s)**
18 U.S.C. 2252(a)(2)	Receipt of Visual Depiction of Minor Engaged in Sexually Explicit Conduct	4/19/02	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on counts(s) ___ and is discharged as to such count(s).

[ ] Count(s)___ (is)(are) dismissed on the motion of the United States.

[ ] Indictment is to be dismissed by District Court on motion of the United States.

[✓] Appeal rights given. [ ] Appeal rights waived.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: **573-45-8976**

Defendant's Date of Birth: **8/20/63**

Defendant's USM No.: **13663-097**

Defendant's Residence Address:
8664 Elk Grove Boulevard
Elk Grove, CA 95326

Defendant's Mailing Address:
8664 Elk Grove Boulevard
Elk Grove, CA 95326

5/21/03
Date of Imposition of Judgment

/s/ WILLIAM B. SHUBB
WILLIAM B. SHUBB
Signature of Judicial Officer

WILLIAM B. SHUBB, United States District Judge
Name & Title of Judicial Officer

[5/28/2003]
Date

AO 245B-CAED (Rev. 9/01) Sheet 2—Imprisonment

[p. 2 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 33 months. The service of sentence is suspended pending appeal.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.
[ ] at___on___
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
[ ] before___ on___.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.
If no such institution has been designated, to the United States Marshal for this district.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to_____
at, _____with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

[p. 3 of 7]

CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13,1994:

[✓] The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

[✓] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check if applicable).

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;
4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit to the search of his person, property, home, and vehicle by a United States Probation Officer, or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
2. The defendant shall not dispose of or otherwise dissipate any of his assets until the fine and/or restitution order by this judgment is paid in full, unless the defendant obtains approval of the court.
3. The defendant shall provide the probation officer with access to any requested financial information.
4. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer.
5. As directed by the probation officer, the defendant shall participate in a correctional treatment program (inpatient or outpatient) to obtain assistance for drug or alcohol abuse.
6. As directed by the probation officer, the defendant shall participate in a program of testing (i.e. breath, urine, sweat patch, etc.) to determine if he has reverted to the use of drugs or alcohol.

7. As directed by the probation officer, the defendant shall participate in a program of mental health treatment (inpatient or outpatient), which may include the taking of prescribed psychotropic medication.

8. The defendant shall not possess or use a computer with access to any "on-line computer service." This includes any Internet service provider, bulletin board system, or any other public or private computer network. Nothing in this order shall be construed as to prohibit the defendant from using a credit card.

9. The defendant shall not possess or use any data encryption technique or program of any kind including but not limited to software, hardware, programming codes, chips and circuit boards.

10. The defendant shall (i) consent to the probation officer and/or probation service representative conducting periodic unannounced examinations of his computer(s) equipment which may include retrieval and copying of all data from his computer(s) and any internal or external peripherals to ensure compliance with the conditions and/or removal of such equipment for the purpose of conducting a more thorough inspection; and (ii) consent at the direction of the probation officer to having installed on his computer(s), at his expense, any hardware or software systems to monitor his computer use.

11. The defendant shall refrain from accessing via computer any "material" that relates to the activity in which he was engaged in committing

the instant offense, namely access to pornography of children or others.

12. The defendant shall provide all business/personal phone records to the probation offcer upon request. Further, the defendant shall provide the probation officer written authorization to request a record of all outgoing or incoming phone calls from any service provider.

13. The defendant shall not possess or use any device that is or contains an internal modem or any other means of accessing the Internet.

14. The defendant shall consent to third party disclosure to any employer or potential employer, concerning any computer-related restrictions that are imposed upon him.

15. As directed by the probation officer, the defendant shall participate in sex offender counseling.

16. The defendant shall not possess, own, use, view or read any sexually explicit material of any kind in any form, or frequent any place where its primary purpose involves sexually explicit material. Sexually explicit conduct is defined at 18 USC 2256(2) and means actual or simulated (a) sexual intercourse, including genital-genital, oral-genital, or oral-anal, whether between the same or opposite sex; (b) bestiality; (c) masturbation; (d) sadistic or masochistic abuse; (e) lascivious exhibition of the genitals or pubic area of any person.

17. The defendant shall register, as required in the jurisdiction in which he resides, as a sex offender.

18. The defendant shall register with the state sex offender registration agency in any state where the defendant resides, is employed, caries on a vocation, or is a student, as directed by the probation officer.

19. The defendant shall cooperate in the collection of DNA as directed by the probation offcer.

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CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	$100	$3,700	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement. . . .$___

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ __.

The defendant shall pay interest on any fine of more than $2500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g).

[✓] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[✓] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 100, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until up to 60 days. An amended Judgment in a Criminal Case will be entered after such determination.

[ ] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

[ ] The defendant shall make restitution to the following payees through the U.S. District Court, in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order of percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or % of Pymnt
	TOTALS:	$___	$___

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

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CASE NUMBER: 2:02CR00164-01
DEFENDANT: JEFFERY HAYMEN GRUBBS

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [✓] immediately; or

B [ ] $ _ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _ ; or

D [ ] in installments to commence _ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _ (e.g. equal, weekly, monthly, quarterly) installments of $ _ over a period of _ year(s) to commence _ day(s) after the date of this judgment.

Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

FORFEITURE

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States: